

III/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law

By Paula E. Berg[†]

To embrace one's braces and crutches would be an act of the grotesque; but to permit one's humanity to be defined by others because of those braces and crutches is even more grotesque.¹

I. INTRODUCTION

At a well-publicized White House ceremony on July 26, 1990, thousands of people with disabilities watched as President George Bush signed the Americans with Disabilities Act (ADA)² into law, declaring, "Let the shameful wall of exclusion finally come tumbling down."³ The President's words captured the optimism of people with disabilities nationwide that the enactment of the ADA,⁴ which extended federal anti-discrimination protection to most private and public institutions,⁵ would

[†] Associate Professor, City University of New York Law School. Research included in this article was supported by a grant from The City University of New York PSC-CUNY Research Award Program. I am grateful to Laura Gans and Lois Milne for their assistance with research and to Gina Goldstein for her editorial suggestions and help in clarifying my ideas. Thanks also to Laura Storto of the *Yale Law & Policy Review*. This article is dedicated to my grandparents Melvin and Lillian Guttmann.

1. Leonard Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro*, 38 AM. SCHOLAR 412, 430 (1969).

2. P.L. No. 101-336, 104 Stat. 328 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994, Supp. I 1995, Supp. II 1996)).

3. JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 140 (1994) (describing the public ceremony celebrating the signing of the ADA).

4. See Peter David Blanck, *Assessing Five Years of Employment Integration and Economic Opportunity Under the Americans with Disabilities Act*, 19 MENTAL & PHYSICAL DISABILITY L. REP. 384, 388 (1995) (finding high expectations about the ADA among people with disabilities from 1990-92).

5. Before the ADA's enactment, federal protection against disability discrimination was limited to the Federal Rehabilitation Act of 1973 (FRA), P.L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C.S. §§ 710-797 (Law. Co-op. 1999)), which prohibited recipients of federal financial assistance from discriminating in education, employment, physical accessibility, and the conduct of any other program or activity, and the Fair Housing Amendments Act of 1988 (FHA), P.L. No. 101-439, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3619 (1994 & Supp. I 1995)), which prohibited discriminating against the disabled in housing. In contrast to the FRA, the ADA, which is not conditioned upon the receipt of federal funds, applies to virtually

finally bring an end to the segregation and stigmatization of the disabled.⁶

Given the broad political consensus that produced the ADA and the inclusion of most social institutions within its antidiscrimination mandate, one might have predicted that the initial wave of decisions under the statute would concentrate on whether an assortment of institutional practices discriminated on the basis of disability.⁷ However, the conduct and practices of defendants have not turned out to be the focus of much ADA jurisprudence. Instead, a large percentage of ADA decisions are exclusively concerned with whether plaintiffs are "disabled" within the meaning of the law,⁸ and the vast majority conclude that they are not, ordinarily as a matter of law.⁹ In contrast, only a handful of judicial decisions under the Federal Rehabilitation Act (FRA), which defines disability in

all private and public institutions. See 42 U.S.C. §§ 12111-12117 (1994) (prohibiting disability discrimination by private employers); 42 U.S.C. §§ 12131-12165 (1994 & Supp. II 1996) (prohibiting disability discrimination by providers of public services); 42 U.S.C. §§ 12181-12189 (1994 & Supp. I 1995) (prohibiting disability discrimination by private entities operating public accommodations and services).

6. In considering the need for the ADA, Congress found that, despite the FRA and FHA, people with disabilities "occupy an inferior status in our society," "are severely disadvantaged socially, vocationally, economically, and educationally," and are "relegated to a position of political powerlessness . . . resulting from stereotypic assumptions not truly indicative" of individual ability. See 42 U.S.C. § 12101(a)(6)-(7) (1994). For a detailed statistical analysis of the social and economic effects of disability discrimination, see UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 27-40 (1983) (describing socio-economic status of people with disabilities); Blanck, *supra* note 4, at 389 (estimating that 50-90% of people with disabilities are unemployed).

7. The ADA passed 91 to 6 in the Senate, see 136 CONG. REC. 17,376 (1990), and 377 to 28 in the House of Representatives, see 136 CONG. REC. 17,296-97 (1990).

8. Between 1995 and 1997, ADA decisions concerning whether the plaintiff was disabled outnumbered by about 2 to 1 decisions concerning defendants' employment decisions, and outnumbered by about 3 to 2 decisions concerning defendants' failure to provide reasonable accommodations. See BUREAU OF NATIONAL AFFAIRS (BNA) CUMULATIVE DIGEST AND INDEX TO AMERICANS WITH DISABILITIES CASES, 1995-1997, *passim* (1997).

9. One study of 60 ADA decisions found that between 1991 and 1995 only 20% of plaintiffs were deemed disabled within the meaning of the statute. See *Courts Continuing Narrow Interpretation of 'Disability': Case Study Shows*, DISABILITY COMPLIANCE BULL., Mar. 27, 1997, at 10. Another study of 110 decisions found that only 6% of the plaintiffs were deemed disabled. See *id.* Commentators have advanced a variety of theories to explain restrictive interpretations of the ADA's definition of disability. See, e.g., Robert L. Burgdorf, "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 414, 438-513 (1997) (arguing that the "special treatment approach" has resulted in overly restrictive interpretation of ADA's definition of disability); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101-02 (1999) (arguing that judicial abuse of summary judgment has resulted in an excessive number of dismissals on the ground that plaintiff is not disabled under the ADA); Stephen S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 108 (1997) (arguing that courts have narrowly construed ADA's definition of disability in response to the perception that too many people with minor conditions were qualifying as disabled); Arlene Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997) (arguing that judicial interpretation of ADA's definition of disability is inconsistent with congressional intent).

III/Legal

the very same manner as the ADA,¹⁰ concern whether plaintiffs are disabled, and a majority of these conclude that they are.¹¹ This trend culminated during the 1998-99 term of the Supreme Court, with three decisions that adopted some of the most restrictive interpretations of the ADA's definition of disability by the lower courts.¹²

The unexpected focus of ADA decisions on plaintiffs and their impairments raises a number of questions that cannot adequately be answered within the analytical confines of disability discrimination law. For example: What epistemological assumptions about the nature of disability underlie judicial construction of a highly restrictive category of disability that excludes many physical and mental conditions from its bounds? Why do courts, as a precondition for obtaining judicial review, subject all plaintiffs claiming disability discrimination to a detailed inquiry into the precise ways in which their impairment limits their bodily functions and daily lives? How does this restrictive category of disability allocate responsibility for maintaining health and managing the consequences of illness and disability between individuals and society as a whole? Finally, what is the relationship between the narrow category of disability in antidiscrimination law and the legal system's larger role in legitimizing existing social and economic relations?

10. Under the Federal Rehabilitation Act, an "individual with a disability" is a person who has "a physical or mental impairment which substantially limits one or more of such person's major life activities; has a record of such impairment; or is regarded as having such an impairment." 29 U.S.C.S. § 705(20)(B)(i)-(iii) (1999). Under the ADA, a disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities . . . ; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C) (1994).

11. Before the ADA was enacted in 1990, only a handful of decisions under the FRA concerned whether the plaintiff was disabled within the meaning of that statute. *See* BUREAU OF NATIONAL AFFAIRS (BNA) INDEX AND CUMULATIVE DIGEST TO FAIR EMPLOYMENT PRACTICES CASES, 1935-1975 (1975), *passim*; BUREAU OF NATIONAL AFFAIRS (BNA) INDEX AND CUMULATIVE DIGEST TO FAIR EMPLOYMENT PRACTICES CASES, 1975-1979 (1979), *passim*; BUREAU OF NATIONAL AFFAIRS (BNA) INDEX AND CUMULATIVE DIGEST TO FAIR EMPLOYMENT PRACTICES CASES, 1979-1983 (1983), *passim*; BUREAU OF NATIONAL AFFAIRS (BNA) INDEX AND CUMULATIVE DIGEST TO FAIR EMPLOYMENT PRACTICES CASES, 1983-1988 (1988), *passim*; BUREAU OF NATIONAL AFFAIRS (BNA) INDEX AND CUMULATIVE DIGEST TO FAIR EMPLOYMENT PRACTICES CASES, 1988-1993 (1993), *passim*. Indeed, in 1984, more than a decade after the FRA's enactment, a court managed to identify only one decision finding that a plaintiff was not disabled within the meaning of that statute. *See Tudyman v. United Airlines, Inc.*, 608 F. Supp. 739, 745 (C.D. Cal. 1984). However, after the ADA was enacted, there was a dramatic increase in the number of FRA decisions that exclusively concerned whether the plaintiff was disabled. *See* BUREAU OF NATIONAL AFFAIRS (BNA) INDEX AND CUMULATIVE DIGEST TO FAIR EMPLOYMENT PRACTICES CASES, 1988-1993 (1993).

12. *See* *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999) (holding that there are no *per se* impairments under the ADA and that all plaintiffs, irrespective of their impairment, must prove that they are disabled); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999) (holding that plaintiffs whose impairments are ameliorated by medical treatment are not disabled under the ADA); *Murphy v. UPS*, 119 S. Ct. 2133 (1999) (holding that plaintiffs who establish that defendant perceived them as unable to perform one job, but not a broad class of jobs, are not disabled under the ADA).

In seeking answers to these questions, this article will investigate the epistemological, moral, and political assumptions underlying the category of disability in antidiscrimination law.¹³ A central premise is that the category of disability, like legal categories generally,¹⁴ is a social construct that performs specific functions within the broader context of the law's legitimizing and naturalizing effect.¹⁵ As Kimberle Williams Crenshaw explains,

Law is an essential feature in the illusion of necessity because it embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable. People act out their lives, mediate conflicts, and even perceive themselves with reference to the law. By accepting the bounds of law and ordering their lives according to its categories and relations, people think that they are confirming reality—the way things must be. Yet by accepting the view of the world implicit in the law, people are also bound by its conceptual limitations.¹⁶

The definition of disability in antidiscrimination law is part of a larger cultural discourse that establishes and upholds dominant notions of health, illness, and disability while imposing a particular set of expectations upon individuals deemed to occupy each class.¹⁷ Specifically, the restrictive category of disability reflects and reinforces the notion that disability is an objective biomedical phenomenon that constitutes an essential aspect of the individual. In keeping with this assumption, a principal function of the category of disability is not to inquire into the exis-

13. A major source of inspiration for this article was Deborah Stone's *The Disabled State*, which advocates interrogating standards for determining disability to "examine how particular constructs and measures systematically exclude certain understandings and include others, how they serve the political interests of some groups at the expense of others, and how they work to produce particular types of policy results." DEBORAH A. STONE, *THE DISABLED STATE* 117 (1984).

14. See ALAN HYDE, *BODIES OF LAW* 231 (1997) ("Law veils its own power . . . by pretending to find what it in fact makes itself. Law pretends to be able to allocate burdens of proof because of natural facts The natural is always . . . a social construction, however, and unavailable as a source of differentiation that is found, not made."); Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 943 (1991) ("We assign the things their weights, and then pretend that it is the scale that gives us the information."); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051 (1978) (explaining that law functions to legitimize existing social relations).

15. See STONE, *supra* note 13, at 26-27 (1984) (describing disability as a socially constructed category that represents a politically fashioned compromise about the legitimacy of claims to social aid).

16. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1351-52 (1988).

17. For a general discussion of the hegemonic effect of definitions of illness and disability, see PETER CONRAD & JOSEPH W. SCHNEIDER, *DEVIANCE AND MEDICALIZATION* 23 (1992) ("[I]n modern industrial society, only law and medicine have the legitimacy to construct and promote deviance categories with wide-ranging application."); STONE, *supra* note 13, at 4 ("The very act of defining a disability category determines what is expected of the nondisabled—what injuries, diseases, incapacities, and problems they will be expected to tolerate in their normal working lives.").

tence of prejudice or an exclusionary physical environment, but rather to establish the exact nature and severity of the impairment itself, because it is the impairment—not the environment—that is seen as the root cause of the social and economic problems faced by the disabled individual.

From a normative standpoint, the category of disability generally reinforces the cult of individualism and, in particular, the dominant American ideology that matters of health and illness are properly the responsibility of the individual, not the social collective. Additionally, while it provides a mechanism for remedying some individual instances of discrimination, this category sustains the stigmatized status of disability by reaffirming the superiority of the healthy “normal” body and by negating, objectifying, and depoliticizing the disabled subject. Finally, despite its indifference to many of the harshest manifestations of disability bias, anti-discrimination law helps to create the veneer of a society and labor market that are rational, highly responsive to the needs of people with disabilities, and singularly concerned with individual merit.

Part II of this Article examines the meaning of disability in antidiscrimination law through the lens of four dominant theoretical paradigms. Part III interrogates the norms and values that underlie and are reinforced by the construction of disability within antidiscrimination law. Part IV analyzes the regressive effects of the restrictive category of disability on antidiscrimination law’s purported objectives of eradicating disability bias and ending the stigmatization of people with disabilities.

II. THE MEANING OF DISABILITY IN ANTIDISCRIMINATION LAW

A. *Theories of Disability*

Social theorists have developed several theoretical paradigms to explain how disability has been conceptualized historically in Western societies.¹⁸ Before the ascendancy of modern science and the medical profession, both illness and disability were largely viewed as the external expression of an individual’s sinfulness and moral impurity.¹⁹ Consistent

18. For a comprehensive analysis of these paradigms, see generally JEROME E. BICKENBACH, *PHYSICAL DISABILITY AND SOCIAL POLICY* (1993); Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 *BEHAV. SCI. & L.* 41 (1996).

19. See generally BICKENBACH, *supra* note 18, at 143 (“Highly visible impairments were at one time thought to be literally stigmatic, that is, signs of sinful and blameworthy behaviour.”); FRANK G. BOWE, *HANDICAPPING AMERICA* 2-16 (1978) (tracing the history of attitudes toward the disabled); SUSAN SONTAG, *ILLNESS AS METAPHOR* (1978) (analyzing the moralization of disease, particularly tuberculosis and cancer); Renee C. Fox, *The Medicalization and Demedicalization of American Society*, 106 *DAEDALUS* 9, 11 (1977) (arguing that, in an earlier age, deviance was considered sinful rather than sick and therefore under the aegis of religious authorities).

with this view, conformity with society's moral strictures was prescribed as the "cure" for mental and physical impairments.²⁰ In the case of those individuals whose physical and mental nonconformity persisted, stigma, segregation, punishment, and even elimination were considered appropriate.²¹

Moral theories continue to influence popular and legal constructions of disability to this day.²² However, the modern era has been dominated by a biomedical paradigm that conceives of disability as a material rather than a moral attribute of the individual.²³ Accordingly, the focus of this perspective is the impairment itself, which is viewed as a "defect, deficiency, dysfunction, abnormality, failing, or medical problem."²⁴ Consistent with its positivist roots, the biomedical model presumes that disability can be ascertained by neutral scientific methods that, once applied, yield a determination of disability that is acontextual and universal.²⁵ While illness and disability are both regarded as objective defects, illness is a bodily abnormality that is within the power of medicine to correct, while disability is permanently beyond the curative capacity of medical science.

The medicalization of disability was emancipatory in the sense that it severed the causal link between disability and individual fault.²⁶ However, it also imposed its own hierarchy and coercive norms.²⁷ The biomedical model conceives of all problems associated with a disability as the natural and inevitable results of being impaired. The disabled are viewed as vic-

to diagnose and to control).

20. For an interesting analysis of volitional explanations of illness and disability, see CHARLES E. ROSENBERG, *EXPLAINING EPIDEMICS AND OTHER STUDIES IN THE HISTORY OF MEDICINE* 274 (1992) ("The desire to explain sickness and death in terms of volition—of acts done or left undone—is ancient and powerful. The threat of disease provides a compelling reason to find prospective reassurance in aspects of behavior subject to individual control.").

21. See Judith Goodwin Greenwood, *History of Disability as a Legal Construct*, in *DISABILITY EVALUATION* 5, 5 (Stephen L. Demeter et al. eds., 1996) ("Throughout history disability and impairment have been unwanted human conditions; therefore, they have been the subject of miraculous recoveries (Jesus healed the lame and the blind) or they have caused ostracism and even punishment (disabled and impaired persons in concentration camps were the first to be exterminated in Nazi Germany).").

22. See *infra* notes 48-49 and accompanying text.

23. See, e.g., BICKENBACH, *supra* note 18, at 61 (stating that disability is most commonly understood as a medical phenomenon); SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* 46 (1998) ("The modernist 'solution' to disability was the . . . medicalization of all responses to disability.").

24. BICKENBACH, *supra* note 18, at 61.

25. See CONRAD & SCHNEIDER, *supra* note 17, at 35 (arguing that the medical model is assumed to have a scientific basis that is morally neutral).

26. See *id.* at 246 ("[M]edicalization is related to a longtime *humanitarian* trend in the conception and control of deviance.").

27. See *id.* at vi ("The medicalization of social problems . . . is not the culmination of a movement to find a solution to the problems but only another period in which one imputed reality is substituted for another.").

III/Legal

tims with special needs whose only hope for a “normal” life is compliance with medical treatment, rehabilitation, and adaptation.²⁸ Individuals with impairments are consigned to the “sick role” within the social order and within the structure of their relationships with medical professionals.²⁹ In this role, they are released from some social responsibilities and are considered entitled to charity so long as they view their condition as undesirable and strive to overcome its limiting effects.³⁰ As one commentator has explained,

The damage done by this medical model of disability has been considerable. If an individual is defined by his or her inability to overcome a disability, he or she is viewed as a failure if unable to do so. Instead of seeing the forces outside the body, outside the impairment, outside the self, as essential to the disabled person's successful negotiation with an often hostile society (whether the barriers be financial, physical, or discriminatory), this view of disability, where cure and eradication of difference are the paramount goals, puts the blame squarely on the individual when a physical impairment cannot be overcome.³¹

By promoting the notion that disability is an inherent individual defect, the biomedical model views people with disabilities as unwanted reminders of the vulnerability of the body that all humans inhabit, and of the limited curative capacity of modern medicine.³² Moreover, this para-

28. See BICKENBACH, *supra* note 18, at 90:

Since the [biomedical] model does not represent the social environment as being part of the problem of disablement, it both fosters and authorizes the assumption that obstacles are given and cannot, or need not, be altered to accommodate people with disabilities [T]he only consistent social strategy for disablement policy is that of meeting the “special” and individualized medical needs of the “patient.”

See also Robert Funk, *Disability Rights: From Caste to Class in the Context of Civil Rights*, in IMAGES OF THE DISABLED, DISABLING IMAGES 7, 7 (Alan Gartner & Tom Joe eds., 1987) (“Historically, the inferior economic and social status of disabled people has been viewed as the inevitable consequence of the physical and mental differences imposed by disability.”); Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda*, in IMAGES OF THE DISABLED, DISABLING IMAGES, *supra*, at 181, 181 (“From the clinical perspective of medicine, efforts to improve the functional capacities of individuals were regarded as the exclusive solution to disability . . .”).

29. The concept of the “sick role” was originated by Talcott Parsons within the context of his analysis of the sociology of medicine. See TALCOTT PARSONS, THE SOCIAL SYSTEM 428-79 (1951). For discussion of the applicability of this concept to the social condition of individuals with disabilities, see Gerben DeJong, *Independent Living: From Social Movement to Analytic Paradigm*, 60 ARCHIVES OF PHYSICAL MED. & REHABILITATION 435, 440-441 (1979) (discussing how the sick role enforces dependency of people with disabilities); Alan Gartner & Tom Joe, *Introduction* to IMAGES OF THE DISABLED, DISABLING IMAGES, *supra* note 28, at 4 (describing the relationship between the sick role and the social exclusion of the disabled).

30. See, e.g., Fox, *supra* note 19, at 15 (“So long as [the sick person] does not abandon himself to illness or eagerly embrace it, but works actively on his own and with medical professionals to improve his condition, he is considered to be responding appropriately, even admirably, to an unfortunate occurrence.”).

31. Kenny Fries, *Introduction* to STARING BACK: THE DISABILITY EXPERIENCE FROM INSIDE OUT 1, 6-7 (Kenny Fries ed., 1997).

32. See David T. Mitchell & Sharon L. Snyder, *Introduction* to THE BODY AND PHYSICAL DIFFERENCE 1, 4 (David T. Mitchell & Sharon L. Snyder eds., 1997) (stating that the view of the

digm largely consigns individuals with disabilities to a position of passivity and dependence. Since disability is understood as a scientific fact, the entire domain—from determining its existence to prescribing its management—becomes the exclusive province of medical professionals.³³ Thus, as managers of the impairment, medical experts occupy a role in the lives of people with disabilities that reinforces their separateness and passivity.³⁴ One commentator has stated that, while disability according to the biomedical perspective “may no longer be viewed as the mark of sinfulness, it is still a stigma of inferiority, neediness, and dependence.”³⁵

With the rise of the social welfare state after the Second World War, a third paradigm of disability arose that greatly influenced public policy and legal definitions of disability. This is the economic model, which views disability as a phenomenon that lies at the intersection of human impairment and the market for labor.³⁶ Specifically, disability is understood as an impairment’s limiting effect on an individual’s functional capacity, and it is assessed according to how much it restricts a person from performing activities deemed central to work.³⁷ Unlike the medical paradigm, the economic model does not conceive of disability as an objective, acontextual fact within the body of the individual. Rather, it is understood as a socio-economic construct that is determined by the relationship between the impairment and the demands of the labor market.

The limited objective underlying the economic model is to promote the economic self-sufficiency of individuals with disabilities by increasing their participation in compensated labor. In this narrow sense, the economic model is emancipatory. However, the goal of promoting economic

disabled as beyond cure “determines disability’s unnatural status in medical and social discourse: people with disabilities are said to be fated or unsalvageable and, thus, somehow stubbornly inhuman”); Susan Wendell, *Toward a Feminist Theory of Disability*, in *THE DISABILITY STUDIES READER* 260, 270 (Lennard J. Davis ed., 1997):

As long as we cling to this belief that patients who cannot be ‘repaired’—the chronically ill, the disabled, and the dying—will symbolize the failure of medicine and more, the failure of the Western scientific project to control nature. They will carry this stigma in medicine and in the culture as a whole.

33. See CONRAD & SCHNEIDER, *supra* note 17, at 241-45.

34. See DeJong, *supra* note 29, at 440 (“A constant medical presence in the lives of disabled persons is said to entail behavior on the part of both medical practitioners and patients that induce dependency. . .”); Funk, *supra* note 28, at 13 (arguing that the medical/rehabilitation model perpetuates a dependent and nonparticipatory role of the patient in relation to the professional and society as a whole).

35. BICKENBACH, *supra* note 18, at 143.

36. See Richard K. Scotch & Edward D. Berkowitz, *One Comprehensive System? A Historical Perspective on Federal Disability Policy*, 1 J. OF DISABILITY POL’Y STUD. 2, 2 (1990) (stating that disability has been defined during the twentieth century in terms of how an individual’s physical or mental attributes affect his or her ability to participate in work force).

37. See BICKENBACH, *supra* note 18, at 103 (“The [economic] model represents people with disabilities as people with an economic problem, those who by virtue of the social reception of an impairment experience a limitation upon their repertoire of productive capacity.”).

III/Legal

self-sufficiency is subordinate to the model's organizing principle, which is economic efficiency. Accordingly, programmatic steps to increase the participation of the disabled in the labor market by, for example, prohibiting discrimination or compelling workplace modifications, are justified only if the cost of such measures is less than their economic benefit. If the opposite is true—that is, if the market saves money by excluding the disabled from the labor market—the model holds that it is socially desirable for the disabled to remain unemployed and to receive direct income support payments from the state.³⁸

The most recent conceptualization of disability is a product of social justice movements and post-modern social theories that have emerged over the past twenty-five years.³⁹ This social-political model rejects the premise of the moral and biomedical perspectives that disability is inherent within the individual. Like the economic model, it understands disability as contextual and relational. However, rather than making the labor market the exclusive determinant of the meaning of disability, the social-political paradigm understands disability as a broader social construct reflecting society's dominant ideology and cultural assumptions.⁴⁰ While it acknowledges the existence of biologically based differences, the social-political model locates the meaning of these differences—and the individual's experience of them as burdensome—in society's stigmatizing attitudes and biased structures rather than in the individual.⁴¹ As one commentator explains, disabilities “are socially constructed phenomena brought about by attitudes toward people with disabilities which, once embedded in social practices and institutions, sustain the disadvantageous social condition of people with disabilities.”⁴²

38. For a critique of the ADA that rests upon an economic approach to problem of disability, see Carolyn L. Weaver, *Incentives vs. Controls in Federal Disability Policy*, in *DISABILITY & WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 3 (Carolyn L. Weaver, ed., 1991) (arguing that employers should not be required to accommodate disabled employees unless the cost of doing so is less than the benefit). Cf. Sue A. Krenek, *Beyond Reasonable Accommodation*, 72 *TEX. L. REV.* 1969 (1994) (arguing that the government should subsidize employers of persons with disabilities to mitigate the economic costs of accommodation).

39. See BICKENBACH, *supra* note 18, at 135-158 (describing theoretical and political origins of the social-political model of disability).

40. See Greenwood, *supra* note 21, at 5 (“The definitions of disability expand and contract more along political and ideological lines than according to any clear physical determinations.”).

41. See UNITED STATES CIVIL RIGHTS COMMISSION, *supra* note 6, at 89 (“Impairments in physical and mental abilities undeniably exist, but the degree to which they control a person's participation in society is as much inherent in the social context as in the impairment.”); DeJong, *supra* note 29, at 443 (“The locus of the problem is not the individual but the environment that includes not only the rehabilitation process but also the physical environment and the social control mechanisms in society-at-large.”); Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 *J. OF SOC. ISSUES* 39, 40 (1988) (“From a socio-political vantage point, the difficulties confronted by disabled persons are viewed as largely the result of the disabling environment instead of personal defects or deficiencies.”).

42. BICKENBACH, *supra* note 18, at 13.

Consistent with its central premise that disability is in the culturally constructed eye of the beholder, the social-political paradigm rejects the notion that disability can be determined by value-free scientific methods. Instead, the designation of some persons as disabled and others as "normal" is viewed as "the false dichotomization of a continuum."⁴³ As the U.S. Civil Rights Commission has stated,

Most popular conceptions and official usages of the term "handicapped" are based on the idea that there are observable physical and mental conditions called "handicaps," that the people denominated handicapped are significantly impaired in ways that distinguish them from "normal" nonhandicapped people and that one either is or is not handicapped. The underlying reality, however, is not so easily categorized. Instead of two distinct classes (handicapped and normal), there are spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional.⁴⁴

Thus, instead of viewing determinations of disability as neutral and universal, the social-political perspective regards them as cultural and political artifacts, even when made by medicine or law.

Most significantly, the socio-political model prescribes a revolutionary approach to alleviating the adverse social and economic consequences of disability. It does not seek to change the individual through medical treatment, rehabilitation, adaptation, or the enforcement of moral strictures, as the medical and moral models do. Nor does it condition human dignity and social equality upon market efficiency, as the economic model does.⁴⁵ Rather, the socio-political model holds that people with disabilities are no less deserving than the able-bodied of a social structure and physical environment that meets their needs. Accordingly, it seeks to transform attitudes and alter the physical environment to accommodate the wide spectrum of abilities within the population.⁴⁶ As Harlan Hahn explains, "the functional capacities required of men and women by the current organization of social life has not been decreed by natural law. Environments can be changed so that they necessitate greater or lesser amounts of individual ability."⁴⁷

43. Greenwood, *supra* note 21, at 9.

44. UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 6, at 87.

45. For a detailed critique of the economic model of disability, see BICKENBACH, *supra* note 18, at 133, in which he argues that the economic model ignores non-economic costs of disability discrimination and is premised upon the assumption that individuals in need do not have a claim to social resources unless society derives an economic benefit from meeting those needs.

46. See *id.* at 161-62 ("In the social-political model disablement is not . . . a brute fact about the world, it is a social problem amenable to social solutions . . . the realization that as a society we create and sustain handicap situations is the central virtue, and emancipatory message, of the social-political model.").

47. Harlan Hahn, *Disability Policy and the Problem of Discrimination*, 28 AM. BEHAV. SCIENTIST 293, 297 (1985).

B. The Meaning of Disability in Antidiscrimination Law

All four of the theories of disability described in the previous section of this article find expression in the text of the ADA. For example, the moral model underlies the express exclusion of an assortment of historically stigmatized differences such as transvestism, transexualism, and kleptomania from the ADA's definition of disability.⁴⁸ These exclusions deny these differences medical legitimacy and sustain their construction as personal moral failings that must be eradicated by conformity with prevailing behavioral norms.⁴⁹

Individuals who are not expressly excluded from the ADA must establish that they have a "disability" as defined by the statute. The so-called "actual" disability prongs of the definition state that an individual with a physical or mental impairment that substantially limits one or more major life activities, or an individual with a record of such an impairment, is disabled within the meaning of the law.⁵⁰ The definition's "regarded as" prong provides that an individual who is "regarded as having such an impairment" is also disabled and entitled to the protections of the Act.⁵¹

The "actual" disability prongs of the ADA largely reflect the biomedical and economic paradigms. The requirement of a physical or mental impairment (or the record of such) focuses on the existence or nonexistence of a physiological or psychological disorder within the body or mind of the individual.⁵² Additionally, the requirement that the impairment substantially limit a major life activity combines the biomedical model's focus on the functional effect of an impairment with the economic model's emphasis on the relationship between the impairment and the activities required by work.⁵³

48. See 42 U.S.C. § 12211 (1994) (expressly excluding transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavioral disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs from the Americans with Disabilities Act).

49. For an analysis of the politics that led to these exclusions, see Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 529 (1991), demonstrating that exclusions were included in the final version of ADA in order to obtain support of the Bush Administration and Congressional conservatives.

50. See 42 U.S.C. § 12102(2)(A)-(B) (1994).

51. 42 U.S.C. § 12102(2)(C) (1994).

52. See 42 U.S.C. § 12102(2)(A)-(B) (1994); see also 29 C.F.R. § 1630.2(h) (1998) (describing physiological and mental disorders and conditions that constitute impairments).

53. Neither the FRA nor the ADA defines major life activities. However, ADA regulations specify examples of major life activities, such as manual tasks, walking, seeing, speaking, sitting, standing, lifting, and reaching, which are implicated in many types of work. See 29 C.F.R. § 1630.2(i) (1998). Additionally, the regulations specify that working is a major life activity. See *id.* Examples of major life activities in the regulations, however, are not limited to work-related

It is the social-political perspective, however, that lies at the heart of disability discrimination law.⁵⁴ The ADA's findings and purposes section recognizes that bias and stigma are chief causes of the economic impoverishment and political powerlessness of people with disabilities.⁵⁵ The social-political paradigm also underlies several of the ADA's provisions. For example, the "regarded as" prong of its definition of disability rests on the proposition that even when a mental or physical condition is not itself substantially limiting, bias and stereotypes can cause the individual to be perceived as disabled and treated differently.⁵⁶ In explaining the purpose of the "regarded as" prong of the definition of disabled contained in the FRA, which is identical to the ADA's,⁵⁷ the Supreme Court stated,

By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.⁵⁸

The ADA's concept of reasonable accommodation is likewise grounded in the social-political premise that disabilities are created and maintained by an environment that fails to meet the needs of all of society's members. Thus, the ADA affirmatively requires the creation of an environment that accommodates the range of physical capabilities among society's members.⁵⁹ Within the workplace, this mandate compels employers to negotiate with disabled employees about their individual needs and to alter existing conditions to meet those needs.⁶⁰ The failure to pro-

functions. For example, the regulations provide that the caring for oneself is a major life activity. *See id.*

54. *See Hahn, supra* note 18, at 46. ("The aim of [antidiscrimination] statutes and the socio-political perspectives is to foster conditions in which disabled and nondisabled persons can occupy positions in society on a basis of genuine equality.").

55. The ADA's findings recognize that disability discrimination has prevented people with disabilities from fully participating in society and competing on an equal basis. *See* 42 U.S.C. § 12101(a)(2)-(9) (1994).

56. *See Howard v. Navistar Int'l Transp. Corp.*, 904 F. Supp. 922, 929-30 (E.D. Wis. 1995) (stating that the "regarded as" prong of the ADA "is designed to combat invidious stereotypes regarding disabled members of society").

57. *See supra* note 10.

58. *School Bd. v. Arline*, 480 U.S. 273, 284 (1986).

59. Title I of the ADA requires employers to make facilities physically accessible and to restructure jobs, acquire equipment, or otherwise modify policies and practices to enable an otherwise qualified disabled person to function on the job. *See* 42 U.S.C. § 12111(9) (1994). Title II requires operators of public services to alter facilities to enable the full participation of qualified disabled persons. *See* 42 U.S.C. § 12147. Title III requires private entities that operate public accommodations to modify policies, practices, and procedures to afford access and participation by persons with disabilities. *See* 42 U.S.C. § 12182(b)(2)(A)(ii).

60. *See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 38-39 (1996):

vide an accommodation is itself unlawful discrimination under the Act.⁶¹

The ADA's concept of reasonable accommodation, however, is tempered by the economic model's core premise that inequality is acceptable if it would be economically inefficient to eliminate it.⁶² Accordingly, an accommodation or modification is not required under the ADA if it would impose an undue hardship or fundamentally alter the nature of the good, service, facility, or privilege provided.⁶³ This qualification reflects the judgment that disability bias is a lesser evil than economic inefficiency.

Despite its centrality to antidiscrimination law, courts have largely eschewed the socio-political perspective when determining whether a plaintiff claiming discrimination is disabled and therefore entitled to legal protection. Instead, they have remained firmly entrenched in an essentialist biomedical understanding of disability, which has resulted in the fabrication of an extremely narrow category of disability.⁶⁴

1. Interpretation of the "Regarded As" Prong

Judicial rejection of the social-political approach is most apparent in decisions interpreting the "regarded as" prong of the definition of disability, which constitutes the most unambiguous expression of this paradigm in the ADA. In construing the "regarded as" prong, courts have rejected the paradigm's bedrock premise that any physical or mental difference can be a disability if it is viewed as such by others because of stereotypes or fear. Instead, they have fixed their gaze on the biomedical nature and severity of the perceived impairment. Judicial acceptance of the notion that there is an essential truth about disability that either does or does not exist within the body of the individual underlies *Forrisi v. Bowen*,⁶⁵ a seminal opinion interpreting the "regarded as" prong. In this decision, the Fourth Circuit Court of Appeals stated that the purpose of

Rather than taking job descriptions as a given, reasonable accommodation doctrine asks how the job might be modified to enable more individuals to perform it. The doctrine asks the employer to accommodate the job to the individual, rather than demanding that individuals accommodate themselves to the job or forgo it altogether.

61. See 42 U.S.C. §§ 12112(b)(5)(A)-(B), 12182(b)(2)(A)(ii), (iii), (iv) (1994).

62. See *supra* notes 36-38 and accompanying text.

63. See 42 U.S.C. § 12112(b)(5)(A) (stating that employers are not required to make accommodations if they would impose an "undue hardship" on the operation of the business); 42 U.S.C. § 12143 (c)(4) (stating that modifications are not required if they would impose an "undue financial burden" on public entities); 42 U.S.C. § 12182 (b)(2)(A)(ii)-(iii) (stating that private operators of public accommodations and services are not required to make accommodations or modifications if they would fundamentally alter the nature of goods or services or impose an "undue burden"). Like the economic model of disability, these provisions place a higher value on economic efficiency than equality.

64. See *supra* notes 23-35 and accompanying text.

65. 794 F.2d 931 (4th Cir. 1986).

antidiscrimination law is to ensure

that *truly disabled*, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.⁶⁶

Biomedical assumptions about disability have led to the contrivance of principles that seek to distinguish between perceived disabilities that are "truly" disabling and those that are not. The practical result has been the imposition of burdensome evidentiary requirements that are fundamentally inconsistent with the social-political origins of the "regarded as" prong of the ADA's definition of disability.

For example, courts have grafted the "actual" disability prong's requirement of a physical or mental impairment that substantially limits a major life activity onto the "regarded as" prong of the definition. Thus, to be protected under the "regarded as" prong, it is not sufficient for an individual to be discriminated against as a result of a real or imagined mental or physical impairment. The defendant must also falsely perceive the impairment to substantially limit one or more of the plaintiff's major life activities, such as caring for him- or herself, performing manual tasks, or breathing.⁶⁷

Thus, unless the defendant's misapprehension concerning the plaintiff's physical or mental state happens to include the erroneous belief that it limits a major life activity, no violation of antidiscrimination law can be considered to have occurred.⁶⁸ For example, in *Thompson v. Holy Family*

66. *Id.* at 934 (emphasis added); see also *EEOC v. R.J. Gallagher Co.*, 959 F. Supp. 405, 409 (S.D. Tex. 1997) (stating that the "regarded as" prong of the ADA's definition of disability is intended "to protect people who have *some obvious specific handicap* that employers might generalize into a disability") (emphasis added). For an argument that inclusion of the "regarded as" prong indicates that Congress did not intend to limit the ADA's protections to individuals who were actually impaired, see Mayerson, *supra* note 9, at 611, in which she states that there would be no reason to include the "regarded as" prong if the statute were intended only to protect those who are truly disabled.

67. See *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2149-50 (1999) (stating that for the plaintiff to qualify as disabled under the regarded as prong, it must be shown that the defendant either (1) "mistakenly believes that [plaintiff] has a physical impairment that substantially limits one or more major life activities," or (2) "mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities").

68. See, e.g., *Burch v. Coca-Cola Co.*, 119 F.3d 305, 322 (5th Cir. 1997) (dismissing claim of "regarded as" discrimination because plaintiff failed to establish that defendant regarded his alcoholism as substantially limiting major life activities); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) (concluding that the plaintiff failed to establish that the defendant regarded his health problem and mood swings as substantially limiting a major life activity); *Aucutt v. Six Flags Over Mid-America*, 85 F.3d 1311, 1320 (8th Cir. 1996) (concluding that the plaintiff failed to establish that the defendant regarded his high blood pressure, angina, and coronary heart disease as a substantially limiting impairment); *Lee v. Trustees of Dartmouth College*, 958 F. Supp. 37, 42 (D.N.H. 1997) (holding that a plaintiff claiming "regarded as" dis-

Hospital,⁶⁹ the Ninth Circuit Court of Appeals affirmed the dismissal of a claim of “regarded as” discrimination by a plaintiff with a back injury who argued that her employer falsely believed her to be incapable of lifting twenty-five pounds. According to the court, in order for the back injury to have been perceived as a disability, the employer would have had to imagine that it prevented the plaintiff from lifting *less than* twenty-five pounds.⁷⁰ The court considered only that particular perceived weight limitation to be substantially limiting.

Similarly, in *Rodriguez v. Loctite Puerto Rico, Inc.*,⁷¹ a woman with lupus erythematosus claimed that she was subjected to a hostile work environment because her employer underestimated the debilitating nature of her disease and regarded her as a malingerer.⁷² Again, the court sought to determine whether the plaintiff was “regarded as” disabled by examining the defendant’s beliefs about the severity of the plaintiff’s impairment. According to the court, the plaintiff failed to establish disability under the “regarded as” prong because the employer’s misapprehension of her condition, which caused him to believe that she was merely lazy, established that he did *not* regard her as substantially limited in her ability to work.⁷³

ability must show that the defendant, who thought plaintiff had multiple sclerosis, believed that this condition substantially limited his ability to learn or perform manual tasks); *South v. NMC Homecare, Inc.*, 943 F. Supp. 1336, 1341 (D. Kan. 1996) (holding that the plaintiff failed to show that the defendant believed that a nonexistent abdominal tumor substantially limited a major life activity); *Hites v. Patriot Homes, Inc.*, 904 F. Supp. 880, 884 (N.D. Ind. 1995) (holding that in order to prove that an employer regarded an employee as disabled, the plaintiff must prove that the defendant “knew of his injury and believed that he was substantially limited because of the injury”). Not all courts have read the requirement of a substantial limitation of a major life activity into the “regarded as” prong. *See, e.g.*, *Taylor v. United States Postal Service*, 946 F.2d 1214, 1216-18 (6th Cir. 1991) (concluding that a plaintiff with degenerative disease in the back and knee was “regarded as” disabled by his employer without analyzing whether the defendant believed it substantially limited a major life activity); *Olbrot v. Denny’s Inc.*, No. 97 C 1578, 1998 WL 525174, at *3 (N.D. Ill. Aug. 19, 1998) (finding that an employer’s hostile remarks about the plaintiff’s cancer were sufficient to raise a material issue of fact as to whether the employer regarded the plaintiff as disabled); *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1084 (W.D. Wisc. 1998) (stating that establishing disability under the “regarded as” prong turns upon whether the defendant’s allegedly prejudicial reactions limited a major life activity, not whether the condition, as perceived, limited a major life activity); *Gray v. Ameritech Corp.*, 937 F. Supp. 762, 770-71 (N.D. Ill. 1996) (holding that a supervisor’s mistaken belief that the plaintiff’s psoriasis was contagious was sufficient to raise a material question of fact on whether plaintiff was “regarded as” disabled); *Muller v. Hotsy Corp.*, 917 F. Supp. 1389, 1411-12 (N.D. Iowa 1996) (stating that an employer’s perception that a spinal injury was disabling was sufficient to raise a material issue of fact under the “regarded as” prong).

69. 121 F.3d 537 (9th Cir. 1997).

70. *See id.* at 541.

71. 967 F. Supp. 653 (D.P.R. 1997).

72. *See id.* at 659 (stating that her supervisors’ misunderstanding about lupus, which caused them to believe she was capable of doing more than she did, demonstrated that they did not consider her substantially limited in any major life activities).

73. This tortured reasoning also underlies the decision in *Van Sickle v. Automatic Data Processing, Inc.*, No. 97-1255, 1998 WL 863707 (6th Cir. Nov. 23, 1998). In this case, the court

Courts have insisted upon proof that the defendant subjectively believed that the plaintiff's condition substantially limited a major life activity, even when the plaintiff's mental or physical condition is widely stigmatized, the defendant held biased attitudes, and these attitudes clearly led to the plaintiff's unequal treatment. For example, in *EEOC v. General Electric Company*,⁷⁴ the plaintiff claimed that he was disabled under the "regarded as" prong because his employer falsely believed he was infected with HIV. While acknowledging that the defendant's belief was erroneous and that it led to the plaintiff's harassment, the court nevertheless held that the latter was not "regarded as" disabled because he had failed to establish the defendant's belief that HIV infection substantially limited the plaintiff's ability to work or engage in another major life activity.⁷⁵ In reaching this conclusion, the court expressly disregarded the social stigma associated with HIV/AIDS, stating, "the general public's view of HIV/AIDS is irrelevant to the specific issues before this court. [The plaintiff] must show that he was personally perceived to have a substantially limiting impairment, and that this perception was held by [the defendant]."⁷⁶

While this interpretation of the "regarded as" prong tips its hat to the social-political perspective in recognizing that disability is a product of the way in which a physical or mental difference is perceived by others, its focus on the defendant's perception of the medical severity of the impairment betrays its fundamental roots in the biomedical paradigm. In contrast, the EEOC's interpretation of the "regarded as" prong⁷⁷ is more consistent with the social-political origins of this provision, because it acknowledges that an impairment can be rendered substantially limiting—that is, disabling—solely through the false perceptions, mistaken assumptions, or unsubstantiated fears of others.⁷⁸

rejected the argument that a supervisor's statement that "we will send in 'Scar Face' Van Sickle to work on the tough deals" established that the plaintiff, who had a large facial scar, was perceived as disabled. Rather, according to the court, this statement indicated the supervisor's confidence in the plaintiff's ability to work. *See id.* at *3.

74. 17 F. Supp. 2d 824 (N.D. Ind. 1998)

75. *See id.* at 831.

76. *Id.*

77. The EEOC's Interpretive Guidance to Title I states, regarded as having such an impairment means:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such a limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities *only as a result of the attitude of others toward such impairment*;
- (3) Has none of the impairments defined [above] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. pt. 1630 app. § 1630.2(l) (1998) (emphasis added).

78. *See* 29 C.F.R. pt. 1630 app. § 1630.2 at 350 (1998) ("[I]f an individual can show that an employer or other covered entity made an employment decision because of a perception of dis-

Plaintiffs who claim that their work⁷⁹ is substantially limited due to a perceived disability must meet an even higher burden, one that draws on the economic model of disability. In these cases, it is not enough for plaintiffs to establish that their employer mistakenly believed that a real or perceived impairment precluded them from performing their job.⁸⁰ They must also establish that the employer regarded them as unqualified to perform a broad class of jobs.⁸¹ Some courts require proof that the employer “see the individual as unqualified for an array of occupations.”⁸² Meeting this burden requires either an admission by the defendant that he or she believed the impairment prevented the plaintiff from performing a number of jobs,⁸³ or proof that a substantial number of employers

ability based on ‘myth, fear or stereotype,’ the individual will satisfy the ‘regarded as’ part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of ‘myth, fear, or stereotype’ can be drawn.”).

79. See 29 C.F.R. § 1630.2(i) (1998) (recognizing work as a major life activity).

80. See *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2151 (1999) (“When the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege that they are unable to work in a broad class of jobs.”); *Murphy v. UPS*, 119 S. Ct. 2133, 2139 (1999) (“[I]n light of petitioner’s skills and the array of jobs available to petitioner utilizing those skills, petitioner has failed to show that he is regarded as unable to perform a class of jobs.”). See also *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (stating that “an impairment that an employer perceives as limiting an individual’s ability to perform only one job is not a handicap” under the FRA); *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (rejecting notion that an individual could “become a handicapped individual” under the FRA only if “seen as unsuited for one position in one plant—and nothing more”).

81. See *Dutcher v. Ingalls*, 53 F.3d 723, 728 (5th Cir. 1995) (holding that a jury could not find plaintiff, a welder, regarded as disabled because of insufficient proof that the defendant believed her impairment would prevent her from performing welding functions generally); *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (“[Under the FRA] an employer regards an employee as handicapped in his or her ability to work by finding the employer’s impairment to foreclose generally the type of employment involved.”); *Nedder v. Rivier College*, 944 F. Supp. 111, 118 (D.N.H. 1996) (holding that the plaintiff must establish that the defendant believed that her obesity prevented her from teaching generally); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 806 (N.D. Ind. 1996) (stating that the proper test is whether the impairment, as perceived, would affect the individual’s ability to find work across the spectrum of same or similar jobs). A minority of courts require only that the plaintiff establish that a perceived disability substantially limited her ability to perform one job. See, e.g., *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996) (holding that the plaintiff established a claim of “regarded as” discrimination by establishing that the defendant knew about his heart attack and hospitalization and fired him after observing fatigue on the job); *Butterfield v. New York State*, No. 96Civ.5144, 1998 WL 401533 at *12 (S.D.N.Y. July 15, 1998) (holding that the plaintiff can satisfy “regarded as” prong by showing that the defendant discriminated against him because of attitudes about his obesity).

82. *Smaw v. Virginia State Police*, 862 F. Supp. 1469, 1473 (E.D. Va. 1994). See also *Smith v. City of Des Moines* 99 F.3d 1466, 1474 (8th Cir. 1996) (dismissing claim of “regarded as” discrimination because the plaintiff, a firefighter, had not established that his employer believed that he was unable to perform jobs other than firefighting); *Motichek v. Buck Kriehs Co.*, 958 F. Supp. 266, 270 (E.D. La. 1996) (dismissing claim of “regarded as” discrimination because plaintiff failed to establish that defendant regarded him as having an impairment that prevented him from performing a broad class of jobs).

83. See, e.g., *id.* at 1475 (dismissing claim of “regarded as” discrimination because employer did not indicate that it viewed plaintiff as unable to perform any job in law enforcement).

would share the defendant's mistaken belief about the limiting effect of an impairment upon the plaintiff's ability to work.⁸⁴ In one of the relatively few of these claims to have survived summary judgment, a vocational expert testified that the impairment, as perceived by the defendant, would prevent the plaintiff from performing half of all unskilled jobs in the local economy.⁸⁵

Like the economic approach, this method of determining disability, which has been dubbed the "one job is not enough" rule, focuses upon the intersection between a perceived impairment and the labor market. Plaintiffs are disabled under the "regarded as" prong only if they can establish that a perceived impairment significantly reduces their employability.⁸⁶

2. Interpretation of the "Actual" Disability Prongs

The failure of courts to embrace the socio-political perspective has similarly constrained interpretation of the "actual" disability prongs of the ADA's definition of disability. Specifically, biomedically based assumptions about the nature of disability have resulted in the construction of a category of "actual" disability that excludes many individuals with a host of debilitating and frequently misunderstood mental and physical impairments.⁸⁷ These decisions do more than merely deny such individuals protection against discrimination and the right to accommodation. They also reproduce and legitimize the very theoretical paradigm that has perpetuated the discredited and dependent status of people with disabilities throughout the modern era.⁸⁸

84. See, e.g., *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (finding that plaintiff was not disabled under the "regarded as" prong because she failed to present evidence that she would be precluded from performing not only the specific job for which she applied, but also a wide range of jobs, if her ability to perform physical tasks was limited in the manner described by the defendant).

85. See *Scharff v. Frank*, 791 F. Supp. 182, 186-87 (S.D. Ohio 1991) ("Assuming that the plaintiff has the physical impairments that she is regarded as having by the defendants, the plaintiff's vocational expert estimates that the plaintiff would be prevented from performing approximately half of the unskilled jobs in the local economy that she would otherwise be qualified to perform.").

86. Several articles have criticized this rule. See, e.g., R. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability To Work*, 11 HOFSTRA LAB. L.J. 203, 235-46 (1993) (arguing that proof of disability discrimination by one employer should satisfy burden of proving substantial limitation on ability to work); Burgdorf, *supra* note 9, at 571-72 ("Properly understood, the need to prove that one is 'disabled' is amply satisfied by proving that an employer purposefully inflicted a negative consequence upon an individual because of a physical or mental impairment (whether real or perceived), thus satisfying the 'regarded as' prong of the definition."); Locke, *supra* note 9, at 109 (criticizing the overly burdensome requirements imposed on plaintiffs claiming a substantial limitation on ability to work).

87. See *infra* notes 93, 95, 97, 99-101.

88. See *supra* notes 26-35 and accompanying text.

As previously explained, the biomedical model defines disability as a functional impairment that is permanently beyond the corrective capacity of medical science.⁸⁹ Consistent with this view, courts routinely hold that short-term mental and physical conditions are not disabilities under the ADA,⁹⁰ even though no such limitation appears in the text or legislative history of the statute.⁹¹ Some courts have gone further by requiring that a medical or psychological condition be permanent to be a disability.⁹² Additionally, the Supreme Court recently rejected the conclusions of the EEOC⁹³ and a majority of circuit courts,⁹⁴ holding that individuals are not

89. See *supra* notes 24-25 and accompanying text.

90. See, e.g., *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997) (holding that mental depression lasting months is not a disability under ADA); *Roush v. Weastec, Inc.*, 96 F.3d 840, 844 (6th Cir. 1996) (holding that a temporary kidney obstruction is not a disability); *Sanders v. Arneson Prods., Inc.* 91 F.3d 1351, 1354 (9th Cir. 1996) (holding that a cancer-related psychological condition that lasted less than four months is not a disability); *Evans v. City of Dallas*, 861 F.2d 846, 852-53 (5th Cir. 1988) (holding that a transitory knee injury is not a disability under FRA); *Kramer v. K&S Assocs.*, 942 F. Supp. 444, 446 (E.D. Mo. 1996) (holding that a broken leg that healed within six months is not a disability); *Pressutti v. Felton Brush, Inc.*, 927 F. Supp. 545, 548-49 (D.N.H. 1995) (holding that a temporary back condition is not a disability).

91. See *Burgdorf*, *supra* note 9, at 476 (“[T]he ADA legislative history offers not a trace of support for ousting temporary impairments from the coverage of the ADA.”). These decisions are consistent with EEOC guidelines, which state that “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.” 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998).

92. See *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997) (“Permanency, not frequency, is the touchstone of a substantially limiting impairment.”); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (holding that a surgically corrected ankle condition is not a disability); *Muller v. Automobile Club*, 897 F. Supp. 1289 (S.D. Cal. 1995) (holding that a temporary psychological condition is not a disability); *Rakestraw v. Carpenter Co.*, 898 F. Supp. 386, 390 (N.D. Miss. 1995) (finding that a back injury that was corrected after an employee’s termination was not a disability); *Blanton v. Winston Printing Co.*, 868 F. Supp. 804, 808 (M.D.N.C. 1994) (holding that a knee injury with minimal permanent residual effects is not a disability).

93. According to the EEOC’s Interpretive Guidance to Title I of the ADA, “[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis without regard to mitigating measures such as medicines, or assistive or prosthetic devices.” 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998). The Supreme Court is rather opportunistic in its approach to EEOC regulations defining disability under the ADA. When the Court disagrees with the EEOC’s interpretation, it disregards the agency and has even questioned its authority to promulgate regulations on the subject. See *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2145 (1999) (“No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA.”). On the other hand, when the Court agrees with the EEOC, it readily invokes the agency’s interpretation of the definition of disability. See, e.g., *id.* at 2151 (applying EEOC criteria for determining whether an individual is substantially limited in ability to work); *Murphy v. UPS*, 119 S. Ct. 2133, 2138-39 (1999) (applying EEOC criteria to determine whether an individual is substantially limited in the major life activity of working).

94. See *Bartlett v. New York State Bd. of Law Exam’rs*, 156 F.3d 321, 329 (2d Cir. 1998) (holding that steps taken by plaintiff to compensate for learning impairment cannot be considered in determining disability); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998) (holding that diabetes that can be corrected by medication is a disability); *Arnold v. UPS*, 136 F.3d 854, 866 (1st Cir. 1998) (holding that medically controllable diabetes is a disability); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997) (holding that the district court erred in finding plaintiff with medically controlled epilepsy not to be disabled); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) (holding that a plaintiff with impair-

disabled if their symptoms are controlled by medication.⁹⁵ This reasoning has led lower courts to hold that asthma,⁹⁶ heart disease,⁹⁷ and diabetes⁹⁸ are not disabilities.

All of these restrictive interpretations of the ADA rest on the premise that disability is an objective biomedical phenomenon that renders an individual essentially "other." In accordance with this view, a person is not disabled unless he or she is permanently beyond the reach of medicine and different.⁹⁹ These decisions reflect not only an essentialist approach to disability but also the modernist faith in medical science and the dominance of the medical profession within society.¹⁰⁰ In these decisions, it is medicine that defines whether or not an individual is disabled, not his or her treatment by society.¹⁰¹ Disputing the assumption that successful medical treatment necessarily transforms the way in which an individual is perceived by others, and hence his or her social status, one court has correctly explained that "[t]he individual is no less disabled, and no less subject to discriminatory treatment, because he or she has made use of the best available medical treatment."¹⁰²

ments that limited vision was disabled under ADA even though his brain had compensated for and mitigated effects of condition); *Harris v. H & W Contracting Co.*, 102 F.2d 516, 520-21 (11th Cir. 1997) (disregarding ameliorative effect of medication on plaintiff's Graves disease in determining disability); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1349 (stating that the effect of mitigating measures should not be considered in determination of disability).

95. See *Sutton*, 119 S. Ct. at 2146-47 ("A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity."); *Murphy*, 119 S. Ct. at 2138 (affirming circuit court finding that petitioner's high blood pressure was not a disability because it was controlled by medication).

96. See *Gaddy v. Four B. Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997).

97. See *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102, 108 (D.R.I. 1997). See also *Murphy v. UPS*, 141 F.3d 1185 (10th Cir. 1999), *aff'd* 119 S. Ct. 2133 (U.S. 1999) (finding that high blood pressure is not a disability because it is treated with medication).

98. See *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445-46 (W.D. Wis. 1996) (finding that an insulin-dependent diabetic is not disabled under the ADA).

99. See *EEOC v. R.J. Gallagher Co.*, 959 F. Supp. 405, 409 (S.D. Tex. 1997) (stating that the ADA only covers conditions "affecting a specific functional capacity that are essentially incurable with current medical science").

100. For a discussion of the modernist faith in medicine, see CONRAD & SCHNEIDER, *supra* note 17, at 241 ("In our society we want to believe in medicine, as we want to believe in religion and our country; it wards off collective fears and reduces public anxieties." (citation omitted)).

101. See, e.g., *Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) ("I do not believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication."); *Hodgens*, 963 F. Supp. at 108 (stating that it is inconceivable that Congress intended determinations of disability under the ADA to be based on what an individual's ability "might be if he abandoned reasonable treatment measures").

102. *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200, 206 (E.D.N.Y. 1997). See also *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) ("The very fact that the [defendant] has a requirement for uncorrected as well as for corrected vision recognizes that the availability of corrective eyewear does not make a visual disability irrelevant."). An attempt by the Fifth Circuit Court of Appeals to take a less dichotomous position on the effect of medication on deter-

III/Legal

An inadequate appreciation of the social and political dimension of disability is also reflected in decisions that automatically exclude from the category of disability plaintiffs who have filed claims for public¹⁰³ or private disability¹⁰⁴ insurance benefits. The conclusion that a person determined to be disabled within the context of one set of legal rules (such as social security law)¹⁰⁵ cannot then be considered disabled within the context of another set of legal rules (such as antidiscrimination law) reflects the false neutrality of the biomedical paradigm in viewing determinations

mining disability under the ADA is no less embedded in essentialism. In *Washington v. HCA Health Services*, 152 F.3d 464 (5th Cir. 1998), the court held that only "serious impairments and ailments," such as diabetes, epilepsy, and hearing impairments, can be considered in their untreated states, while all other conditions would not be considered disabling if ameliorated by medicine. The court's distinction between serious and nonserious impairments presumes that the former are always disabling (even when treated), while those it considers nonserious are never disabling when treated. To be considered "serious," an impairment must require that the individual "use mitigating measures on a frequent basis, that is, he must put on his prosthesis (sic) every morning or take his medication with some continuing regularity." *Id.* at 470. Of course, it is precisely these kinds of presumptions and stereotypes about the inherently limiting effect of certain mental and physical conditions that antidiscrimination law was intended to eliminate.

103. See, e.g., *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997), *vacated*, 119 S. Ct. 1597 (1999) (holding that representations of disability in application for social security disability creates rebuttable presumption that the claimant judicially estopped from establishing disability under ADA); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481-82 (9th Cir. 1996) (concluding that plaintiff who claimed total disability in applying for state benefits failed to raise issue of material fact as to whether disabled under ADA); *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 617-18 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997) (finding that HIV infected plaintiff who certified to SSA that he was "totally and permanently disabled" and "unable to work" was judicially estopped from claiming that otherwise qualified under the ADA). But see *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1332 (10th Cir. 1998) (holding that declarations and determinations of disability under social security law are relevant to, but do not estop, claims of disability under the ADA); *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 2018 (1999) (holding that an individual's application for and receipt of Social Security disability benefits does not bear on eligibility for ADA protections); *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582, 586 (D.C. Cir. 1997) (holding that awards of disability benefits cannot bar ADA relief).

104. See, e.g., *Bollenbacher v. Helena Chemical Co.*, 934 F. Supp. 1015, 1027 (N.D. Ind. 1996) (holding that plaintiff, who represented himself as totally disabled for the purpose of receiving insurance benefits, was estopped from claiming disability under the ADA); *Lewis v. Zilog*, 908 F. Supp. 931, 945 (N.D. Ga. 1995) (holding that plaintiff was estopped from claiming disability under ADA in part on the basis of his application for long-term disability benefits); *Harden v. Delta Air Lines, Inc.*, 900 F. Supp. 493, 496 (S.D. Ga. 1995) (finding the plaintiff's argument that she can perform essential functions of position "disingenuous given plaintiff's assertions of total disability" in connection with application for disability benefits); *Reigel v. Kaiser Found. Health Plan*, 859 F. Supp. 963, 967-70 (E.D.N.C. 1994) (holding that plaintiff's and doctors' statements of inability to work in connection with claim for disability benefits precluded claim under the ADA).

105. To be "disabled" under the Social Security Act, a claimant must establish the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (1994). Additionally, the impairment must be "of such severity that [he or she] is not only unable to do [his or her] previous work, but cannot, considering . . . age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A).

of disability as acontextual and universal.¹⁰⁶

A notable exception to these decisions is the Supreme Court's recent ruling in *Cleveland v. Policy Management Systems Corp.*,¹⁰⁷ which rejected an essentialist approach and held that a claim or a determination of disability under social security law does not automatically mean that a plaintiff is not disabled under the ADA.¹⁰⁸ Writing for a unanimous court, Justice Breyer recognized that declarations and determinations of disability are neither absolute nor universal, but rather legal artifacts that must be understood within the specific context from which they derive meaning and significance.¹⁰⁹

Notwithstanding the Supreme Court's ruling in *Cleveland*, the overwhelming majority of judicial decisions interpreting the meaning of disability in antidiscrimination law remain firmly rooted in essentialist biomedical assumptions. As a result, people with temporary and treatable conditions, and people regarded as having anything less than a crippling impairment, have been denied protection against discrimination. The next section will explore the normative functions served by the construction of a category of disability that excludes so many of the ill and im-

106. Judicial faith in an absolute universal truth about disability that can be discovered by medicine and law led the court in *Harris v. Marathon Oil Co.*, 948 F. Supp. 27 (W.D. Tex. 1996), to declare:

It is *impossible* for [the plaintiff] to have been totally disabled under social security law and able to perform the essential functions of his position under the ADA. To allow [plaintiff] to assert that he was able to perform the duties of his employment with [defendant] at the same time as he collected disability benefits, awarded as a result of his representations that he could no longer work, would countenance a fraud, either on this court or on the federal agency that awarded him those benefits.

Id. at 29 (emphasis added). As several commentators have noted, the definition of disability in the Social Security Act is indifferent to the impact of an on-the-job accommodation. Therefore, it is conceivable that a person could qualify for social security benefits and be able to perform the essential functions of a job under the ADA if accommodated. Additionally, an individual's medical condition may have improved after he or she qualified for social security benefits. See Burgdorf, *supra* note 9, at 504 (noting that decisions holding that persons who have claimed disability under the SSA are not disabled under the ADA ignore the ADA's requirement of a reasonable accommodation); Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1032-42 (1998) (explaining that decisions excluding persons deemed disabled under the SSA from definition of disability under the ADA fail to recognize the different meanings of these concepts within two statutory schemes); Frank S. Ravitch, *Balancing Fundamental Disability Policies: The Relationship Between the Americans with Disabilities Act and Social Security Disability*, 1 GEO. J. ON FIGHTING POVERTY 240, 246 (1994) (providing concrete examples of differences between the ADA, the SSDI Program, and the SSI Program).

107. 119 S. Ct. 1597 (1999).

108. See *id.* at 1603 (holding that pursuit or receipt of social security disability benefits does not estop or create a presumption that the plaintiff is not disabled under ADA, but the plaintiff must explain why these assertions are consistent with a claim of disability under ADA to survive summary judgment).

109. See *id.* at 1601 ("An SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, 'I am disabled for the purposes of the Social Security Act.'").

paired from its bounds.

III. THE MORAL FUNCTION OF THE CATEGORY OF DISABILITY IN ANTIDISCRIMINATION LAW

Categorical distinctions between those who do and those who do not deserve rights and benefits conferred by law uphold values and norms central to the existing social and economic order. In the case of public assistance, for example, Joel Handler and Yeheskel Hasenfeld argue that the eligibility criteria are “fundamentally a set of symbols that try to differentiate between the deserving and undeserving poor in order to uphold . . . dominant values . . . through the symbols it conveys about what behaviors are deemed virtuous or deviant.”¹¹⁰ Similarly, Deborah Stone asserts that the definition of disability in social security law “determines what is expected of the nondisabled—what injuries, diseases, incapacities, and problems they will be expected to tolerate in their normal working lives.”¹¹¹

In antidiscrimination law, the types of impairments included in and excluded from the category of disability likewise reveal the values and normative assumptions that underlie and are reinforced by this body of law.¹¹² The normative function of the category of disability is to reinforce individualism, perpetuate the “disabled overcomer” as a cultural icon, and enforce the obligation of most disabled individuals to adapt themselves to the existing social and physical environment.

These norms underlie restrictive judicial interpretations of the requirement that an impairment substantially limit a major life activity.¹¹³

110. JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY* 11 (1991).

111. STONE, *supra* note 13, at 4.

112. See Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 835-36 (1976) (examining the boundaries of the category of disability in social security law as a means of discovering underlying moral values).

113. See, e.g., *Johnson v. American Chamber of Commerce Publishers*, 108 F.3d 818, 820 (7th Cir. 1997) (stating that the “major life activities hurdle . . . screens out trivial claims” under the ADA). The requirement that an impairment substantially limit a major life activity has been read into all prongs of the ADA’s definition of disability. Thus, a person claiming disability on the basis of a record of impairment, that is, a documented history of a mental or physical illness, must establish that the condition, when manifest, substantially limited a major life activity. See *Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998); see also 29 C.F.R. 1630.2(k) (stating that “a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”). Given this requirement, if a condition did not produce symptoms or otherwise significantly restrict the person’s functions, the information contained in a medical record may form the basis for unfavorable treatment by an employer without running afoul of the ADA. Additionally, as previously stated, the requirement of a substantial limitation on a major life activity has also been read into the “regarded as” prong of the definition. See *supra* Subsection II.B.1. For an argument that a condition need not limit a major life activity to be disabling, see Burgdorf, *supra* note 49, at 448.

For example, courts have set an extraordinarily high threshold for determining that a condition is "substantially" limiting—higher, in fact, than that which has been empirically determined to significantly limit an individual's employment opportunities.¹¹⁴ Essentially, plaintiffs are not disabled under antidiscrimination law unless a mental or physical impairment is nearly totally incapacitating.¹¹⁵ For instance, the Supreme Court recently reversed a decision holding that monocular vision substantially limits the ability to see.¹¹⁶ Similarly, according to the Third Circuit Court of Appeals, an orthopedic condition does not substantially limit the ability to walk unless it necessitates the use of a cane or crutches.¹¹⁷ Neither is a learning disability substantially limiting unless it causes the plaintiff to learn more slowly than 90% of the population.¹¹⁸ And non-Hodgkin's lymphoma was deemed not substantially limiting, because it did not restrict the plaintiff's ability to "walk, see, hear, speak, breathe and work without impairment until the late stages of the disease."¹¹⁹

Additionally, courts have equated the phrase "major life activity"¹²⁰ with "activities of daily living," a concept from social security law that focuses on an impairment's effect on the most elementary functions of the

114. A recent federal study found that individuals with non-severe functional or activity limitations were considerably more likely to be unemployed than workers without these limitations. See U.S. NAT'L INST. ON DISABILITY AND REHABILITATION RESEARCH, U.S. DEPT. OF EDUC., CHARTBOOK ON WORK AND DISABILITY IN THE UNITED STATES 10, 14 (1998) (finding that 32.2% of people with any functional limitation are employed though 82.1% of people with no functional limitation are employed, and finding a 51.8% rate of labor force participation among people with some activity limitation compared to a 83% rate of labor force participation among individuals with no activity limitation).

115. See, e.g., *Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (finding that panic attacks that hampered plaintiff's ability to speak and breathe were not substantially limiting because the disorder did not usually impede these activities); *Baxter v. Northwest Airlines, Inc.*, No. 96 C 2060, 1998 WL 603121 (N.D. Ill. Sept. 4, 1998) (finding that back injury that prevented plaintiff from lifting more than 10 pounds frequently and more than 20 pounds infrequently was not substantially limiting); *Johnson v. New York Med. College*, No. 95 CIV. 8413, 1997 WL 580708 (S.D.N.Y. Sept. 18, 1997) (holding that colitis that caused cramping, rectal bleeding, lower back pain, nausea, explosive diarrhea, and mental depression, necessitating a month and a half of in-patient treatment, was not substantially limiting because conditions did not result in repeated hospitalizations or absences from work for extended periods of time).

116. See *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999); see also *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (holding that a plaintiff who was blind in one eye was not substantially limited in ability to see).

117. See *Kelly v. Drexel Univ.*, 94 F.3d 102, 106 (3d Cir. 1996) (stating that a plaintiff who had "great difficulty walking" had not proven disability because he did not require any "special devices" to walk, such as a cane or crutches).

118. See *Price v. National Bd. of Med. Exam'rs*, 966 F. Supp. 419, 427 (S.D. W. Va. 1997) (suggesting that a learning impairment is disabling if it causes a person to learn as slowly as the bottom 10% of population).

119. *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977, 981-82 (N.D. Ill. 1997).

120. Neither the FRA nor ADA defines the term "major life activity." Regulations under the ADA define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i) (1998).

III/Legal

human body.¹²¹ This reductionism has resulted in decisions holding that relatively infrequent or complex human activities, such as sex,¹²² reproduction,¹²³ social interaction,¹²⁴ and awareness,¹²⁵ are not major life activities. As a consequence, courts have determined that plaintiffs with conditions such as infertility, asymptomatic infection with HIV (and other conditions that limit sex and reproduction),¹²⁶ and epilepsy¹²⁷ are not disabled.

121. See *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2143 (1999) (suggesting that Congress intended disability under the ADA to be determined by a functional approach, which examines the effect of impairment upon usual activities, rather than a health conditions approach, which looks at whether an individual has a condition that impairs his or her health); see also *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (determining that the plaintiff failed to establish a substantial limitation on major life activities because she could "take care of the normal activities of daily living," such as feeding herself, grooming, picking-up trash, and vacuuming); *Terrell v. USAIR, Inc.*, 955 F. Supp. 1448, 1453 (M.D. Fla. 1996) (finding that carpal tunnel syndrome did not substantially limit a major life activity because the plaintiff retained the ability to care for herself); *Krskovic v. Wal-Mart Stores, Inc.*, 948 F. Supp. 1355, 1362 (E.D. Wis. 1996) (holding that to be "major," an activity must be among those "that are a necessary part of the everyday lives of most people or are otherwise 'basic functions'"); *Hatfield v. Quantum Chem. Corp.*, 920 F. Supp. 108, 110 (S.D. Tex. 1996) (finding that the plaintiff hospitalized on several occasions for severe major depression, post-traumatic stress disorder, and borderline personality disorder was not disabled because he retained the ability to care for himself and his family, groom, drive a car, have lunch at a restaurant, cook, and work in his yard). For a provocative analysis of the normative assumptions and gender bias underlying impairment-based methods of determining disability, see Ellen Pryor Smith, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guide to the Evaluation of Permanent Impairment*, 103 HARV. L. REV. 964 (1990).

122. See *Runnebaum v. Nationsbank of Md.*, 123 F.3d 156, 170-71 (4th Cir. 1997) (stating that intimate sexual relations may not constitute a major life activity); *Johnson v. New York Med. College*, No. 95 Civ. 8413, 1997 WL 580708, at *6 (S.D.N.Y. Sept. 18, 1997) (implying that sex is not a major life activity).

123. In *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998), the Supreme Court held that reproduction is a major life activity. Prior to this decision, a number of courts had reached the opposite conclusion. See, e.g., *Runnebaum v. Nationsbank of Md.*, 123 F.3d 156, 170-71 (4th Cir. 1997) (stating that the court is not convinced that reproduction is a major life activity); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (stating that it would be inconsistent with regulations to treat reproduction as a major life activity, and a "considerable stretch of federal law"); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (stating that it could not "reasonably infer" that reproduction is a major life activity).

124. See *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (expressing doubt about whether getting along with others is a major life activity).

125. See *Deas v. River W.*, 152 F.3d 471, 479 (5th Cir. 1998) (declining to recognize that awareness is a major life activity); *Innes v. Mechatronics, Inc.*, No. 96-35515, 1997 WL 409585, at *2 (9th Cir. July 14, 1997) (recognizing that staying awake and alert are major life activities only in relation to individual's ability to work).

126. In *Bragdon*, 118 S. Ct. at 2196, the Supreme Court held that asymptomatic HIV infection was a disability under the ADA because it limited the plaintiff's ability to reproduce. Prior to this decision, a number of courts had reached the opposite conclusion. See, e.g., *Krauel*, 95 F.3d at 674 (holding that asymptomatic HIV infection is not a disability); *Cortes v. McDonald's Corp.*, 955 F. Supp. 541, 546 (E.D.N.C. 1996) (holding that asymptomatic HIV infection is not a disability); *Zatarain*, 881 F. Supp. at 243 (holding that a reproductive disorder is not a disability); *Runnebaum*, 123 F.3d 156 at 170-71 (holding that a reproductive disorder is not a disability).

127. See *Deas v. River West*, 152 F.3d 471, 475 (5th Cir. 1998) (finding that epilepsy is not a disability).

The "one job is not enough" rule,¹²⁸ which is applied to cases in which the plaintiff claims a substantial limitation on the ability to work,¹²⁹ has excluded the largest group of employees experiencing adverse consequences of a mental or physical impairment from the category of disability. Typically in these cases, the plaintiff has a physical or mental condition that restricts the performance of a job held prior to the condition's onset.¹³⁰ After recuperating and returning to work, the plaintiff is discharged or denied an accommodation.¹³¹ These cases constitute the most common type of discrimination challenged under the ADA.¹³²

As previously explained,¹³³ the "one job is not enough rule," which has recently been sanctioned by the Supreme Court,¹³⁴ imposes nearly insur-

128. For a critical, in-depth analysis of the "one job is not enough" rule, see Bales, *supra* note 86, at 242 ("A person should be recognized as substantially limited in the major life activity of working if that person is excluded from even one job because she is—or is regarded as—disabled."); Burgdorf, *supra* note 9, at 439-55, 573-74.

129. EEOC regulations specify that work is a major life activity. See 29 C.F.R. pt. 1630 app. § 1630.2(i) (1998).

130. See, e.g., *Coleman v. Keebler Co.*, 997 F. Supp. 1102, 1108 (N.D. Ind. 1998) (adjudicating plaintiff's discrimination claim based on employer's refusal to offer transfer after employee was absent from work to recover from surgery to alleviate arthritis); *Piper v. Kimberly-Clark Corp.*, 970 F. Supp. 566, 568-69 (E.D. Tex. 1997) (adjudicating plaintiff's ADA claim due to being terminated several weeks after returning to work after recovering from on job-related back injury); *Gomez v. American Bldg. Maintenance*, 940 F. Supp. 255, 256 (N.D. Cal. 1996) (considering discrimination claim of janitor, who sustained back injury that prevented him from returning to his position, based on employer's refusal to provide employee training as janitorial foreman); *Leslie v. St. Vincent New Hope, Inc.*, 916 F. Supp. 879, 880 (S.D. Ind. 1996) (considering discrimination claim of health care attendant, who suffered back injury on the job, based on employer's failure to reassign employee to lighter duty or to transfer her after she returned to work); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1099 (S.D. Ga. 1995) (adjudicating claim of plaintiff, who sustained occupational injury that necessitated two-year absence from work, due to employer's refusal to offer employee accommodation upon his return); *Bolton v. Scrivner, Inc.*, 836 F. Supp. 783, 785-86 (W.D. Okla. 1993) (adjudicating discrimination claim of plaintiff, who sustained work-related injury to his feet, based on employer's refusal to permit him to return to former or any other position).

131. In such a circumstance, workers might have a claim under the Family and Medical Leave Act of 1993 if they were discharged or otherwise discriminated against for exercising a right protected under this statute, which requires that employers offer employees a 12-week unpaid leave of absence due to a serious medical condition. See 29 U.S.C. §§ 2612, 2615(a)(1) (1994).

132. Nearly three quarters of all disability discrimination claims under the ADA involve discharge or the failure to provide reasonable accommodations. See Peter Blanck & Mollie Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 369 (1997) (finding that 50% of all EEOC charges involve discharge, 28% involve failure to provide accommodation, 10% involve hiring, and 12% involve disability-related harassment).

133. For a discussion of the "one job is not enough rule" within the context of the "regarded as" prong of the definition of disability, see *supra* notes 61 *et seq.* and accompanying text.

134. See *Murphy v. UPS*, 119 S. Ct. 2133 (1999) (affirming decision that mechanic's ability to work was not substantially limited because he retained the capacity to perform mechanic jobs that did not require driving a commercial vehicle); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999) (affirming dismissal of claim on ground that petitioners were not substantially limited in their ability to work because, while they were unable to perform job of global pilot, they could function as regional pilots or pilot instructors).

mountable burdens. Under this rule, plaintiffs who claim that an impairment substantially limits their ability to work must demonstrate more than an inability to perform their job.¹³⁵ Instead, they must demonstrate an inability to perform an entire class or category of jobs, despite their training and experience in a specific type of employment and their self-identification as a specific type of worker or professional.¹³⁶ Thus, for example, the Sixth Circuit Court of Appeals held that carpal tunnel syndrome was not a disability because, while it prevented the plaintiff (an assembly line worker) from performing medium- and heavy-duty factory labor, it did not disqualify her from light-duty manufacturing jobs.¹³⁷ Some courts have gone even further, requiring that plaintiffs prove that their impairment prevents them from performing virtually any type of work.¹³⁸ As one court stated, a condition does not substantially limit the ability to work unless it “place[s] the individual so far outside the norm as to make it impossible or unusually difficult . . . to perform work that could be done by most other people.”¹³⁹

135. See *Patrick v. Southern Co. Servs.*, 910 F. Supp. 566, 570-71 (N.D. Ala. 1996) (“[‘Working’ does not mean working at the particular job of that person’s choice.”) (quoting *Wooten v. Farmland Foods*, 58 F.3d 382, 385-86 (8th Cir. 1995)). It is interesting to note that in the Netherlands, disabled workers need only establish that they cannot perform their customary job to qualify for financial assistance from the government. See LEO J.M. AARTS & PHILIP R.M. DE JONG, *ECONOMIC ASPECTS OF DISABILITY BEHAVIOR*, 27-39, 354 (1992).

136. See, e.g., *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2152 (1999) (affirming the dismissal of a claim on the ground that the petitioners were not substantially limited in their ability to work because, while they were unable to perform the job of a global pilot, they could function as regional pilots or pilot instructors); *Murphy v. UPS*, 119 S. Ct. 2133, 2138-39 (1999) (affirming decision that a mechanic’s ability to work was not substantially limited because he retained the capacity to perform mechanic jobs that did not require driving a commercial vehicle); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995) (asserting that the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of ability to work); *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992) (holding that the plaintiff, whose allergy only prevented her from performing lab work, was not disabled under FRA); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (holding that the plaintiff, who had crossed eyes that prevented him only from performing the job of mail sorter, was not disabled under FRA); *Shah v. Upjohn Co.*, 922 F. Supp. 15, 25 (W.D. Mich. 1995) (dismissing a claim by a lab technician with fourteen years of experience because she failed to demonstrate that she could not perform non-laboratory work); *Patrick v. Southern Co. Servs.*, 910 F. Supp. 566, 570 (N.D. Ala. 1996) (holding that the plaintiff, who suffered from an allergy did not establish that the condition prevented her from working in a class of jobs or a broad range of jobs in various classes).

137. See *McKay v. Toyota Motor Mfg., Inc.*, 110 F.3d 369, 372-73 (6th Cir. 1996). The EEOC argued as *amicus curiae* that the plaintiff was disabled because her condition prevented her from performing any manual labor exceeding light duty. See *id.* at 372.

138. See *Hileman v. City of Dallas*, 115 F.3d 352, 354-55 (5th Cir. 1997) (stating that the plaintiff claiming a substantial limitation of the ability to work bears the burden of proving that she could not find any job); *Bolton v. Scrivner, Inc.*, 836 F. Supp. 783, 788 (W.D. Okla. 1993) (stating that plaintiff must establish that the condition restricts his “overall employment opportunities” to establish substantial limitation of the ability to work).

139. *Welsh v. City of Tulsa*, 977 F.2d 1415, 1418 (10th Cir. 1992) (quoting *Cook v. R.I. Dep’t of Mental Health, Retardation & Hosps.*, 783 F. Supp. 1569, 1574 (D.R.I. 1992)); see also *Locke, supra* note 9, at 122 (“Unless the plaintiff can prove that his unemployability significantly exceeds his employability, courts will find that the plaintiff is not sufficiently limited in his em-

In short, to meet the burden of the "one job is not enough" rule, plaintiffs must prove something close—but not equal to—total disability.¹⁴⁰ Either they must demonstrate that they applied for and did not obtain a considerable number of comparable jobs or they must submit the testimony of vocational experts.¹⁴¹ In one of the relatively few of these cases to survive summary dismissal, the court held that the testimony of the defendant's vocational expert—that the plaintiff was unable to perform 90% of all jobs within the nation's economy—was sufficient to raise a material issue of fact as to whether the plaintiff was disabled under the ADA.¹⁴²

The "one job is not enough rule," along with the other restrictive interpretations of the definition of disability discussed above, creates a false dichotomy among individuals with mental and physical conditions by separating them into two groups: the deserving disabled and the merely ill.¹⁴³ Those who are defined as "disabled" merit legal protection from dis-

ployment opportunities to be considered disabled.").

140. Plaintiffs alleging that a condition substantially limits their ability to work must run a gauntlet to establish a *prima facie* case under the ADA. On the one hand, evidence that a condition is substantially limiting may be used to refute a plaintiff's claim that he or she can perform the essential functions of a job, which is another element of a *prima facie* case. *See, e.g., Hatfield v. Quantum Chem. Corp.*, 920 F. Supp. 108, 110 (S.D. Tex. 1996) ("It is logically inconsistent for Hatfield to say he is so impaired that he cannot care for himself, while at the same time saying that he can go to work and perform his job."). On the other hand, evidence of an ability to perform the essential functions of a job may be used to refute a plaintiff's claim of disability. *See, e.g., Murphy v. UPS*, 119 S. Ct. 2133, 2138-39 (1999) (stating that the plaintiff's proof that he could perform various jobs as a mechanic undermined his claim that he was disabled).

141. *See, e.g., Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (showing that the plaintiff failed to produce the testimony of a vocational expert to demonstrate the substantial limitation of his ability to work); *Piper v. Kimberly-Clark Corp.*, 970 F. Supp. 566, 572 (E.D. Tex. 1997) (demonstrating that testimony by a rehabilitation expert showing that job opportunities for the plaintiff were not prevalent was not sufficiently detailed to defeat a motion for summary judgment); *Lamury v. Boeing Co.*, 5 Am. Disabilities Cas. (BNA) 39, 44 (D. Kan. 1995) (dismissing the claim because the plaintiff failed to produce demographic and vocational evidence); *Fields v. Lyng*, 705 F. Supp. 1134, 1136 (D. Md. 1988) (suggesting that the proof that the plaintiff's condition substantially limited his ability to work was not necessarily established by his rejection from over 300 jobs). *But see Leslie v. St. Vincent New Hope, Inc.*, 916 F. Supp. 879, 885 (S.D. Ind. 1996) (rejecting the requirement that the plaintiff produce job market data to establish a substantial limitation on his ability to work).

142. *See Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1101 (S.D. Ga. 1995). In light of the fact that the plaintiff's nearly total disability was established by the *defendant's* vocational expert, it is remarkable that the court did not find the plaintiff disabled as a matter of law. *See also Jasmantas v. Subaru-Isuzu Automotive, Inc.*, 139 F.3d 1155, 1157 (7th Cir. 1998) (holding that the defendant's expert's testimony that the plaintiff's impairment prevented her from performing 88% of the jobs in the county was sufficient to raise a triable issue of fact on whether she was disabled under ADA).

143. The rhetoric of the deserving and undeserving disabled was explicitly employed during congressional debate on the ADA. For example, Rep. Dan Burton argued that individuals with AIDS, hepatitis, and serious psychiatric conditions were undeserving of the status of "disability." *See* 135 CONG. REC. 22731 (1989) (statement of Rep. Burton). Professor Robert Burgdorf, who participated in drafting the ADA, asserts that the predominant view within the Reagan and Bush administrations and the EEOC at the time of the statute's enactment was that disability discrimination law was a "special service" that only the severely disabled deserved. *See Burgdorf*,

criminatory treatment, segregation, or exclusion.¹⁴⁴ Additionally, the requirement of reasonable accommodation exempts “disabled” individuals from the prevailing expectation that it is the obligation of individuals to conform to the existing demands of the physical environment. For the deserving disabled, the reverse is required—the physical and social environment must be changed in response to their needs.¹⁴⁵

In contrast, the merely ill are officially deemed unworthy of these social interventions and legal protections. As a result, they may be singled out for unfavorable treatment solely because others find their physical or mental condition frightening, embarrassing, or otherwise offensive. As Judge Richard Posner has noted approvingly, antidiscrimination law “is not a general protection of medically afflicted persons If the employer discriminates against [individuals] on account of their being . . . ill, even permanently ill, but not disabled, there is no violation.”¹⁴⁶

Neither are the merely ill worthy of accommodation. Instead, it is up to them to do whatever is necessary to function in a world designed to meet the needs of the healthy and able-bodied. Those who fail to acquire the status of “disabled” under antidiscrimination law are thus judged capable of bearing the burden of their impairment or illness on their own.

By assigning the protected status of deserving disabled to so few individuals with mental and physical conditions and the unprotected status of merely ill to so many, the restrictive category of disability in antidiscrimination law reinforces the cult of the individual in American society and affirms self-reliance as the ultimate American virtue. Within the moral framework of antidiscrimination law, the only impaired individuals who deserve society’s sympathy and assistance are those who strive for autonomy and self-support despite the most severe physical and mental conditions. In drawing its boundaries so narrowly, the category of disability thus affirms the obligation of all but the most impaired to rise above their limitations, to meet the challenges of the physical and social world, and to manage the consequences of their condition unaided. The inability of these individuals to overcome their impairments is a sign of moral failure

supra note 9, at 568.

144. See 42 U.S.C. §§ 12112(a), 12132, 12183 (1994) (defining “discrimination” as used in ADA titles I, II, and III, respectively).

145. Required accommodations under the ADA include physically accessible facilities, restructured jobs, modified work schedules, revised eligibility criteria, and specially adapted equipment. See 42 U.S.C. §§ 12111(9), 12112(a)-(b); see also 42 U.S.C. § 12112(5)(a) (stating that discrimination includes failing to reasonably accommodate disabled individuals).

146. *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1053 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1304 (1998); see also *Benedict v. Eau Claire Pub. Schs.*, No. 97-2513, 1998 WL 60374, at *7 (7th Cir. Feb. 10, 1998) (“Where the employer discriminates against an individual who is ill, who is mistakenly thought to be ill, or who may even be permanently ill but is not disabled, there is no violation of the Act.”).

on their part, not society's.

The "one job is not enough rule," in particular, enforces the expectation that, absent a crippling condition, workers must bear the employment consequences of their illness or impairment privately, without any assistance from their employers. This expectation obtains regardless of the employee's length of service and even when the impairment results directly from of the employee's effort to serve the employer's interests by doing his or her job. For example, in *Hatfield v. Quantum Chemical Corporation*,¹⁴⁷ a male plant worker was sexually harassed by a male supervisor who frequently called him "pussy" and repeatedly requested oral sex.¹⁴⁸ On one occasion, the supervisor pulled the plaintiff's head in the direction of his groin. As a result of this treatment, the plaintiff developed psychiatric symptoms and was hospitalized several times. Upon returning to work, the employer denied the plaintiff's request to be reassigned to another supervisor. In summarily dismissing the claim, the court found that, while the plaintiff's psychiatric condition substantially limited his ability to work for the defendant, it did not substantially limit his ability to do other work under other supervisors, who presumably would not harass him sexually.¹⁴⁹

Similarly, in *Gomez v. American Building Maintenance*,¹⁵⁰ a janitor who had worked for the defendant for 15 years suffered an on-the-job back injury that permanently prevented him from doing janitorial work. The plaintiff filed an action under the ADA after the defendant denied his request for accommodation—either retraining as a janitorial foreman or reassignment to lighter duty. Seizing on the plaintiff's request for these positions, as well as on medical evidence demonstrating that he was able to perform the less strenuous tasks they involved, the court summarily dismissed the claim because "the evidence shows that while the plaintiff is unable to perform the job duties of a janitor . . . he is able to work."¹⁵¹ The message of these cases is clear: workers who suffer an occupational illness or injury and lose their job as a result must simply re-enter the labor market and absorb the adverse social and economic consequences, including those associated with discrimination, without legal protection.¹⁵²

147. 920 F. Supp. 108 (S.D. Tex. 1996).

148. See *id.* at 109. The court dismissively referred to the cause of the plaintiff's disability as his "interaction" with his supervisor. See *id.* at 110.

149. See *id.*

150. 940 F. Supp. 255 (N.D. Cal. 1996).

151. *Id.* at 259.

152. The category of disability in antidiscrimination law facilitates the existence of a "reserve army" of the unemployed, comprised of workers who are terminated or denied accommodation after recovering from an injury or illness. Lacking a right to reemployment or to accommodation under antidiscrimination law, and unable to perform the job in which they have training and experience, workers who sustain occupational injuries or suffer an illness are forced

Consistent with its roots in individualism, the restrictive category of disability in antidiscrimination law reinforces the exalted status of the “overcomer” in American culture—the individual who, through sheer determination, triumphs over daunting obstacles to achieve self-sufficiency and fulfill the social obligation to work. Indeed, by including within its ambit only those individuals with the most severe impairments, this narrow category creates inspirational role models—paragons of personal autonomy who serve as reminders that any and all impediments to work and self-sufficiency can and must be overcome, even (and perhaps especially) in this era of dwindling social services. During congressional debate on the ADA, stories of overcomers were periodically invoked to convince skeptical legislators that people with disabilities are consummate Americans—hard-working, self-sacrificing, invincible—and therefore deserving of legal protection against discrimination.¹⁵³ It is perhaps this affirmation of the ethic of self-reliance and individual autonomy that accounts for the widespread support for the ADA among Republican legislators, many of whom simultaneously opposed social welfare legislation benefiting the disabled¹⁵⁴ and civil rights laws protecting other marginalized groups.¹⁵⁵

back into the labor market where they are unlikely to command comparable status or wages. If the injury or illness necessitated an extended period of unemployment, these workers may be under great pressure to accept a lower paying or entry level position.

153. See, e.g., 135 CONG. REC. S10,803 (daily ed. Sept. 7, 1989) (describing story of Mark Wellman, who overcame paraplegia to climb Mt. Capitan).

154. The 101st Congress did not enact the following social welfare measures to aid people with disabilities: H.R. 5774, 101st Cong. (1990) (amending the Internal Revenue Code allowing disabled taxpayers a one-time exclusion on gain from sale of residence); Social Security Benefits Improvement Act of 1990, H.R. 5142, 101st Cong. (1990) (amending the Social Security Act to increase earnings permitted to disabled beneficiaries without loss of eligibility for benefits); H.R. 5105, 101st Cong. (1990) (amending the Social Security Act to provide benefits for disabled widows and widowers without regard to age); H.R. 4517, 101st Cong. (1990) (amending the Social Security Act to afford all disabled individuals the same SSI income exclusions that are available to blind persons); H.R. 4154, 101st Cong. (1990) (amending the Social Security Act to reduce the waiting period for Medicare eligibility for disabled individuals); Home Repairs for Older and Disabled Homeowners Act of 1990, H.R. 3928, 101st Cong. (1990) (authorizing grants to disabled individuals to repair and modify their homes); Veterans Compensation Cost-of-Living Adjustment Act of 1990, S. 2100, 101st Cong. (1990) (increasing rates of compensation and enhancing health care, education, and housing benefits for veterans with service-connected disabilities).

155. The 101st Congress did not enact the following civil rights legislation: Employee Protection Act of 1990, H.R. 4420, 101st Cong. (1990) (prohibiting employers from discriminating against employees who refuse to submit to sterilization or fertility test); Civil Rights Amendment Act of 1989, H.R. 655, 101st Cong. (1989) (amending the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination based on sexual orientation and affectional preference); Equality in Education Act of 1987, H.R. 495, 101st Cong. (1989) (amending the Internal Revenue Code denying tax exempt status to educational institutions that discriminate on basis of race); Diversification in Broadcast Ownership Act of 1989, H.R. 248, 101st Cong. (1989) (amending the Broadcast Ownership Act of 1989 to provide incentives to increase the number of women- and minority-owned broadcast stations); Broadcasting Equal Employment Opportunity Act of 1989, H.R. 247, 101st Cong. (1989) (amending the Communications Act of 1934 to require

The elevated moral status of the overcomer is also reflected in and reinforced by antidiscrimination law's method for determining disability. Neither the Federal Rehabilitation Act nor the Americans with Disabilities Act expressly specifies any impairments that are "per se" disabling. Consequently, the Supreme Court¹⁵⁶ and the EEOC¹⁵⁷ have taken the position that there are no "per se" disabilities under either statute. As a result, every claim of disability under antidiscrimination law is adjudicated on a case-by-case basis.¹⁵⁸ Thus, in order to secure a remedy for unequal treatment, all plaintiffs claiming discrimination must begin by establishing that they have, or were perceived to have, a mental or physical impairment that substantially limits a major life activity.¹⁵⁹ This individualized method of determining disability under antidiscrimination law is in marked contrast to social security law, which recognizes that some mental and physical conditions are unquestionably incapacitating.¹⁶⁰

In determining disability on an individualized basis and rejecting the premise that particular physical or mental conditions are necessarily incapacitating, antidiscrimination law reflects and reinforces the deeply held American value of personal sovereignty, and the concomitant belief

radio and television broadcasters to adopt affirmative action programs); NonDiscrimination in Advertising Act of 1989, H.R. 138, 101st Cong. (1989) (amending the Internal Revenue Code to penalize persons who discriminate against minority-owned communications entities).

156. See *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162, 2169 (1999) (holding that the language of the ADA, by defining disability with "respect to an individual," 42 U.S.C. § 12102(2) (1994), and in terms of the impact of an impairment on "such individual," 42 U.S.C. § 12102(2)(A), mandates individualized disability determinations in all cases); see also *Sutton v. United Air Lines, Inc.* 119 S. Ct. 2139, 2147 (1999) ("Whether a person has a disability under the ADA is an individualized inquiry.").

157. See Interpretive Guidance to Title I of the ADA, 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998) (stating that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis").

158. See, e.g., *Deas v. River West*, 152 F.3d 471, 479 (5th Cir. 1998) (declining to recognize any per se disabilities under ADA); *Ennis v. National Ass'n of Bus. & Educ. Radio*, 53 F.3d 55, 60 (4th Cir. 1995) (holding that plain language of ADA does not permit the conclusion that HIV infection is per se a disability); *Byrne v. Board of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992) (determining disability under FRA should be on a case-by-case basis); *McKey v. Occidental Chem. Corp.*, 956 F. Supp. 1313, 1317 (S.D. Tex. 1997) (holding that the ADA does not recognize any per se disabilities); *Merry v. A. Sulka & Co.*, 953 F. Supp. 922, 925 (N.D. Ill. 1997) (holding that there are no per se disabilities under ADA). But see *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 777 (E.D. Tex. 1996) (finding that HIV infection and AIDS are per se disabilities).

159. See, e.g., *Albertsons*, 119 S. Ct. at 2169 (holding that all those who claim the Act's protection must "prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial").

160. Claimants for social security disability benefits are judged disabled per se if they have a condition that "meets or equals" an impairment specified on a lengthy list provided by the Social Security Administration. See 20 C.F.R. § 404.1520(d), 404.1525, 404.1526 (1998). Approximately 60% of recipients of social security disability benefits have a listed impairment. See *Cleveland v. Policy Management Sys. Corp.*, 119 S. Ct. 1597, 1603 (1999). From a normative standpoint, Lance Liebman asserts that social security law's per se approach to determining disability "incorporates common expectations and shared values about which infirmities a person ought not to have to bear and keep working." Liebman, *supra* note 112, at 853 (emphasis omitted).

III/Legal

that any type of personal misfortune, even the most crippling congenital impairment, can and must be overcome by individual will.¹⁶¹ The faith of antidiscrimination law in the hegemony of the individual is also revealed in its recognition that, while no impairments are per se disabling, there are per se nondisabilities, which presumably can be overcome by all.¹⁶²

Consistent with this philosophy, disability discrimination law is profoundly suspicious of any plaintiff who professes to be limited by a physical or mental impairment.¹⁶³ The requirement that each and every plaintiff prove disability within the context of an adversarial process by a preponderance of the evidence to the satisfaction of a judge is aimed at ferreting out malingerers. Within this structure, federal judges are the system's gatekeepers, ever watchful for claimants who falsely claim disability and renounce self-reliance in order to secure less demanding working conditions through the statute's reasonable accommodation requirement.

Judicial disdain for individuals perceived to have needlessly abandoned their personal sovereignty to illness or impairment will occasionally bubble to the surface of disability discrimination jurisprudence. For example, in *Hileman v. City of Dallas*,¹⁶⁴ the Fifth Circuit Court of Appeals invoked the denigrating imagery of the welfare system to express its antipathy toward the plaintiff, who was viewed as having opted for the benefits of antidiscrimination law instead of striving to overcome his impairments on his own.¹⁶⁵ The court stated, "We refuse to construe the Rehabilitation Act as a *handout* to those who are in fact capable of working

161. See IRVING K. ZOLA, *MISSING PIECES*, 200 (1982). Zola states:

The United States is a nation built on the premise that there is no mountain that cannot be leveled, no river that cannot be tamed, no force of nature that cannot be harnessed. It should be no great surprise that we similarly claim that there is no disease that cannot be cured.

Id.

162. See *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (holding that obesity is not disabling); *Runnebaum v. Nationsbank of Maryland*, 123 F.3d 156, 169 (4th Cir. 1997) (holding that asymptomatic HIV infection "will never qualify as an impairment"); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (holding as a matter of law that the inability to lift 25 pounds is not disability under ADA); *EEOC v. R.J. Gallagher Co.*, 959 F. Supp. 405, 409 (S.D. Tex. 1997) (stating that cancer is not a per se disability); *Johnson v. New York Med. College*, No. 95 CIV. 8413, 1997 WL 580708, at *6 (S.D.N.Y. Sept. 18, 1997) (holding that colitis is not a substantially limiting impairment).

163. This skepticism is shared by some critics of the ADA who routinely assert—without providing any empirical support—that many claims of disability under antidiscrimination law are feigned. See, e.g., Erica Worth Harris, *Controlled Impairments Under the Americans With Disabilities Act: A Search for the Meaning of 'Disability'*, 73 WASH. L. REV. 575, 586 (1998) (arguing, without empirical support, that ADA's "flexible" definition of disability and "extraordinary benefits" encourage "creative employees to search for a basis to claim disability protection").

164. 115 F.3d 352 (5th Cir. 1997).

165. The plaintiff had multiple sclerosis and a spastic colon. See *id.* at 352.

....”¹⁶⁶ This characterization of disability discrimination law is echoed in conservative critiques that explicitly liken the ADA to welfare.¹⁶⁷

Finally, by exempting the social collective from any responsibility in managing the consequences of illnesses and impairments that are less than crippling,¹⁶⁸ antidiscrimination law contributes to the construction of health and illness as fundamentally private concerns.¹⁶⁹ The case of *EEOC v. R.J. Gallagher Co.*,¹⁷⁰ in which an employee with leukemia challenged his termination under the ADA, is illustrative. Even though this plaintiff's condition required that he miss three to five days of work each month to receive chemotherapy, the court refused to recognize his condition as substantially limiting. Under this decision, medical needs are private burdens that no bearing on whether or not a condition is a “disability” whose adverse effects on an employee must be shared by society.

IV. THE POLITICAL FUNCTIONS OF THE CATEGORY OF DISABILITY IN ANTIDISCRIMINATION LAW

Progressive legal scholars argue that the existence of formal rights under antidiscrimination law both advances and hinders the attainment of equality.¹⁷¹ On the one hand, the process of securing, utilizing and pre-

166. *Id.* at 354 (emphasis added); see also *Young v. U.S. West Communications*, No. 97-2287, 1998 WL 849523 (10th Cir. Dec. 9, 1998). Judges also frequently feel compelled to remind plaintiffs (and those who read judicial opinions) that the ADA is not a “job insurance policy.” See, e.g., *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995); *Rogers v. CH2M Hill*, 18 F. Supp. 2d 1328, 1342 (M.D. Ala. 1998); *Kirkendall v. UPS*, 964, F. Supp. 106, 112 (W.D.N.Y. 1997); *Murphy v. UPS*, 946 F. Supp. 872, 877 (D. Kan. 1996), *aff’d* 141 F.3d 1185 (10th Cir. 1999), *aff’d* 119 S. Ct. 2133 (1999).

167. See, e.g., Walter Y. Oi, *Disability and a Workfare-Welfare Dilemma*, in *DISABILITY & WORK*, *supra* note 38, at 31, 45 (“The ADA will result in an inflated population of disabled persons whose welfare will become increasingly dependent upon an evergrowing federal bureaucracy. Charles Murray may have another opportunity to test his model.” (emphasis added)); Weaver, *supra* note 38, at 15 (describing the ADA’s reasonable accommodation requirement as a “mandated benefit program” that “amounts to an off-budget spending program”); Christopher J. Willis, Comment, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715, 730 (1995) (describing the ADA as a tool to redistribute wealth from consumers and able-bodied workers to individuals with disabilities who invoke the statute’s protections).

168. In contrast, several other laws socialize some of the costs and consequences of illnesses and impairments that impede the ability to work. These statutes include: social security laws, which provide income to the disabled workers who cannot engage in any gainful activity; workers’ compensation laws, which provide income to employees who are unable to work due to an injury or condition that is job-related; and the Family and Medical Leave Act, which requires an unpaid leave of absence for workers who are unable to perform their job. See 29 U.S.C. §§ 2611-2615 (1994).

169. Additionally, the intensely private concepts of health and illness that are embedded within disability discrimination law reinforce the legitimacy of the U.S. health care system, to which access is a matter of private means and personal circumstance, not collective right.

170. 959 F. Supp. 405 (S.D. Tex. 1997).

171. For scholarship exploring the contradictory functions of antidiscrimination law in the-

serving legal rights focuses the emancipatory aspirations of marginalized groups and facilitates the formation of a collective identity.¹⁷² Additionally, antidiscrimination laws provide an important instrument with which to resist exclusion.¹⁷³ In cautioning against the temptation to dismiss the salutary effect of formal legal rights on the lives of African-Americans, Kimberle Williams Crenshaw has stated,

Although liberal legal ideology may indeed function to mystify, it remains receptive to some aspirations that are central to Black demands, and may also perform an important function in combating the experience of being excluded and oppressed. This receptivity to Black aspirations is crucial given the hostile social world that racism creates.¹⁷⁴

However, formal legal rights also thwart the creation of an equitable social order. Given the general legitimizing function of the law, antidiscrimination law in particular is unlikely to produce widespread social change.¹⁷⁵ As a consequence, successful disability discrimination claims are likely to be restricted to those that pose no significant threat to majority interests or to the existing social and political order.¹⁷⁶ Indeed, a recent study found that employers prevailed in ninety-two percent of all cases finally decided under Title I of the ADA.¹⁷⁷

Moreover, the rhetoric of equal rights creates a mystique of equality that masks continuing inequality and legitimizes expressions of the very types of bias that the law professes to prohibit.¹⁷⁸ Again, Crenshaw ex-

ory and as applied to particular bodies of law, see generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 164-72 (1990) (describing and critiquing the critical legal studies critique of antidiscrimination law); Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998) (analyzing the positive and negative effects of a formal equality approach to ending discrimination on the basis of gender); Crenshaw, *supra* note 16 (critiquing race discrimination law); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (critiquing antidiscrimination law as applied to discrimination on the basis of accents).

172. See Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1590 (1984) (arguing that the process of securing legal rights can strengthen a movement's consciousness and awaken a sense of possibility).

173. See Becker, *supra* note 171, at 252-53 (discussing how formal equality has improved women's lives); Crenshaw, *supra* note 16, at 1357 (discussing the transformative potential of race discrimination law).

174. Crenshaw, *supra* note 16, at 1357.

175. See *supra* notes 15-17 and accompanying text.

176. See DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW § 9.6, at 117 (2d ed. Supp. 1984) ("Discrimination claims, when they are dramatic enough, and do not greatly threaten majority concerns, are given a sympathetic hearing, but there is a pervasive sense that definite limits have been set on the weight that minority claims receive . . ."); see also Gabel, *supra* note 172, at 1591 (obtaining formal legal rights tempts a civil rights movement to return power to the state in exchange for the law's recognition of a narrow set of demands).

177. See American Bar Association, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL AND PHYSICAL DISABILITY L. REP. 403, 404 (1998).

178. See Freeman, *supra* note 14, at 1052 and *passim* (arguing that antidiscrimination law legitimizes racial inequality as a nonviolation while assuming that society has already attained

plains,

[W]hat at first glance appears an unambiguous commitment to antidiscrimination conceals within it many conflicting and contradictory interests. In anti-discrimination law, the conflicting interests actually reinforce existing social arrangements, moderated to the extent necessary to balance the civil rights challenge with the many interests still privileged over it.¹⁷⁹

Disability discrimination law similarly embodies contradictions that both advance and counteract the elimination of inequality based on disability. For example, the process of securing formal legal rights—especially under the ADA—did serve to focus and mobilize the emancipatory aspirations of people with disabilities.¹⁸⁰ Additionally, there is some evidence that the ADA has improved the lives of people with disabilities even in the relatively short period since it was enacted.¹⁸¹

However, disability discrimination law also impedes the attainment of equality by stigmatizing disabled plaintiffs, undermining political unity among people with disabilities, and legitimizing many forms of disability bias. These aspects of disability discrimination law are explored below.

A. *The Stigmatization and Objectification of the Disabled*

To earn the right to tell their story of unequal treatment, plaintiffs claiming disability discrimination must first recount the story of their difference—that is, their “abnormality.” To convince the state that they are “truly” disabled, plaintiffs must engage in a dialogue that includes an investigation of precisely how their physical or mental condition restricts their bodily functions and life activities.¹⁸² Within this context, plaintiffs

color-blindness).

179. Crenshaw, *supra* note 16, at 1348; *see also* Freeman, *supra* note 14, at 1042 and *passim*.

180. *See* SHAPIRO, *supra* note 3, at 126 (describing unifying effect of the struggle to enact the ADA).

181. *See generally* Blanck, *supra* note 4, at 394 (finding improvement in the lives of some people with disabilities since the ADA’s enactment). *But see* National Organization on Disability, *Executive Summary of 1998 National Organization on Disability/Louis Harris & Associates Survey of Americans with Disabilities* (July 23, 1998) (visited May 3, 1999) <<http://www.nod.org/presssurvey.html>> (finding no improvement between 1986-1998 in gaps between disabled and nondisabled in socializing, going to a restaurant, income, access to health care, and satisfaction with life).

182. *See* Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2168-69 (1999) (stating that the Ninth Circuit Court of Appeals was “too quick” to find that monocular vision was a disability because it had not inquired into precise ways in which condition limited petitioner’s ability to see); *Poindexter v. Atchison, Topeka and Santa Fe Railway Co.*, 168 F.3d 1228, 1232 (10th Cir. 1999) (reversing denial of defendant’s motion for summary judgment on the ground that the lower court had failed to engage in sufficiently detailed inquiry into nature of plaintiff’s impairment and precisely how it limited major life activity). The only ADA plaintiffs who may be excused from the requirement of proving disability are those who claim discrimination on the basis of a preemployment inquiry. *See* Griffin v. Steeltek Inc., 160 F.3d 591, 595 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1455 (1999) (holding that a non-disabled individual may bring a cause of action under 42 U.S.C. § 12112(d)(2), which prohibits inquiries about whether a job applicant is dis-

must do more than prove that they have a recognized medical diagnosis, which itself often contains a functional component.¹⁸³ Instead, they are interrogated regarding their physical or mental differences, and a judgment is made as to whether those differences prevent them from leading a "normal" life.¹⁸⁴ Claims of disability under antidiscrimination law are most likely to be recognized if they are corroborated by experts and statistics.¹⁸⁵

All plaintiffs—even those whose impairments are life-threatening¹⁸⁶ or obviously disabling¹⁸⁷—must endure this inquiry, which often requires the disclosure of detailed, intimate, and embarrassing information. For example, to earn the right to be protected against discrimination because she was infected with HIV, Sidney Abbott was required to convince the court that the infection substantially limited her sex life and her plans to have children.¹⁸⁸ To obtain judicial review of her termination, Jessica Ryan was required to convince a court that colitis had substantially affected her excretory functions.¹⁸⁹ Plaintiffs who are insufficiently detailed

abled); *Gonzales v. Sandoval County*, 2 F. Supp. 2d 1442, 1444 (D.N.M. 1998) (holding that a plaintiff need not prove disability to state a claim for prohibited inquiry under ADA). *But see* *Miller v. City of Springfield*, 146 F.3d 612, 615 (8th Cir. 1998) (ruling that a nondisabled plaintiff may not bring ADA claim challenging preemployment medical test).

183. This is especially true of diagnostic criteria for psychiatric conditions. *See* Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 719 (1997) (arguing that the proof of existence of some psychiatric disorders should create a presumption of disability under ADA based on functional limitations).

184. *See* *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15-16 (1st Cir. 1997) ("[I]mpairment is to be measured in relation to normalcy or in any event to what the average person does."); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment . . . but rather on the effect of that impairment on the life of the individual." (quoting 29 C.F.R. 1630.2(j) app. (1995))).

185. *See, e.g.*, *Baxter v. Northwest Airlines, Inc.*, No. 96 C 2060, 1998 WL 603121 (N.D. Ill. Sept. 4, 1998) (dismissing summarily an ADA claim because the plaintiff failed to produce admissible deposition testimony from his doctor); *Kriskovic v. Wal-Mart Stores, Inc.*, 948 F. Supp. 1355, 1364 (E.D. Wisc. 1996) (dismissing summarily an ADA claim because the plaintiff's doctor's testimony that condition substantially limited his ability to walk was "subjective" and not corroborated by "objective" medical tests).

186. *See, e.g.*, *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977, 982 (N.D. Ill. 1997) (stating that the determination of disability under the ADA must be individualized even if the plaintiff is afflicted with a disease that is life-threatening or ultimately fatal).

187. *See* *Bancale v. Cox Lumber Co.*, No. 97-113-CIV-FTM-25D, 1998 WL 469863, at *4 (M.D. Fla. May 18, 1998) ("just because Plaintiff may be diagnosed as legally blind . . . it does not mean he is disabled under the ADA . . . he must go beyond mere labels and show that this impairment substantially affects a major life activity.").

188. *See* *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206-07 (1998). Ms. Abbott testified about her sexual relations and practices before she became infected with HIV and how her infection with HIV limited these practices. To prove that the infection substantially limited her ability to reproduce, Ms. Abbott testified about her plans to have children and the impact of her infection upon these plans. *See* *Bragdon v. Abbott*, 912 F. Supp. 580, 586 (D. Me. 1995).

189. *See* *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871 (2d Cir. 1998) (describing testimony from plaintiff about how colitis and explosive diarrhea necessitated frequent trips to the

in describing the nature and effects of their impairment risk summary dismissal.¹⁹⁰

The requirement that all plaintiffs claiming discrimination submit to a detailed and probing judicial inquiry that highlights and particularizes their impairment serves a number of regressive functions. First, this frequently humiliating process stigmatizes those claiming disability discrimination and thereby discourages others from seeking legal protection. In this regard, it is not unlike the means test used to assess eligibility for welfare benefits, which deters applicants by demeaning them and highlighting their dependence.¹⁹¹ Indeed, there is evidence that people with disabilities are increasingly doubtful that the ADA will significantly improve their lives.¹⁹²

Individualized disability determinations under antidiscrimination law also perpetuate the notion that there is a diametric relationship between the disabled and the able body.¹⁹³ To establish disability under antidiscrimination law, the plaintiff's physical or mental differences from the "normal" body must be construed as defects, inadequacies, oddities, or failures. On occasion, judges in discrimination cases have unabashedly used such language to describe disability.¹⁹⁴ This ritual of constructing the plaintiff's disability in opposition to the "normal" body and mind serves to reaffirm the superiority of the able body and the inferiority of disability.¹⁹⁵ Indeed, to a follower of French philosopher Michel Foucault, the

bathroom and caused her to soil her clothing at work).

190. See *Poindexter v. Atchison, Topeka, and Santa Fe Ry.*, No. 97-3273, 1999 WL 92255, at *4 (10th Cir. Feb. 24, 1999) (holding that plaintiffs must articulate with precision impairment alleged and affected major life activity to state claim under ADA); *Schulter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1446 (W.D. Wisc. 1996) (dismissing summarily plaintiff's claim because, although she established that she had been repeatedly hospitalized for diabetic reactions to insulin, she had not provided sufficient detail about frequency of hospitalizations, duration of hospitalizations, and precise symptoms that had precipitated hospitalizations).

191. See HANDLER & HASENFELD, *supra* note 110, at 118.

192. See Blanck, *supra* note 4, at 389 (finding that, by 1992, perception among disabled that ADA would increase access to society had dropped almost to pre-ADA level); National Organization on Disability, *supra* note 181 (finding that only 35% of people with disabilities think that the ADA has had a positive effect on their lives).

193. See David M. Engle, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 205 (1991) (arguing that the Education for All Handicapped Children Act, which protects the educational rights of disabled children, reinforces the belief that children with disabilities are essentially abnormal).

194. See, e.g., *EEOC v. R.J. Gallagher Co.*, 959 F. Supp. 405, 409 (S.D. Tex. 1997) (stating that the plaintiff could not be perceived as disabled, because "he did not have a condition—a defect—that [the employer], based on erroneous social stereotypes, could generalize into an inability to function on the job." (emphasis added)).

195. For a discussion of the relationship between stigmatization and the language of difference, see JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US* 66 (1998) ("The meaning of disability as infirmity/deformity has a long history. This history is testimony to the force of language and its power of description . . . [This language] provide[s] an ideological mechanism that subtly but convincingly dehumanizes people."); MINOW, *supra* note 171, at 112-13 ("Categories for organizing perception assign differences to some but not others and thus perpetuate or in-

dedication of antidiscrimination law to probing and cataloging the disabilities of each and every plaintiff suggests a kind of “pleasure” in the construction of a pathological subject.¹⁹⁶

Within the structure of disability determinations, the plaintiff’s body is an object to be investigated by lawyers, doctors, and vocational experts, and ultimately codified by a judge. The position of the plaintiff recalls that of the patient in a biomedical encounter, who is considered and diagnosed according to a set of predetermined categories.¹⁹⁷ This experience of being the object of the detached curiosity of able-bodied professionals is likely to be all too familiar to the plaintiff.¹⁹⁸ As Leonard Kriegel explains,

[I]t is perfectly legitimate to question the cripple about virtually every aspect of his private life. The normal possesses the right to his voyeurism without any obligation to involve himself with its object. He wants the picture drawn for him at the very moment that he refuses to recognize that the subject of this picture is, like him, a human being¹⁹⁹

In its probing of the plaintiff’s psyche and body, antidiscrimination law commonly discounts the plaintiff’s own perspective and experiences.²⁰⁰ Disability is determined far less by how the plaintiff describes the impairment’s effect on his or her life than by how it is understood by others²⁰¹—in particular by medical and vocational experts.²⁰² One court,

crease disparities of power between groups.”); ZOLA, *supra* note 161, at 237 (arguing that discredited status of disability “is inevitable as long as different than continues to be translated as less than”).

196. For a discussion of the relevance of Michel Foucault’s work to disability studies, see Mitchell & Snyder, *supra* note 32, at 19 (describing how the work of Michel Foucault can be used to examine “the pleasurable investments undergirding discourses that reproduce, expand, and tediously detail taxonomic catalogs of disability’s pathological trajectories”).

197. For a discussion of the relationship between knowledge and power in the context of the biomedical encounter, see MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC* 113 (A.M. Sheridan Smith, trans. 1973) (“[T]he analytical structure is neither produced nor revealed by the picture itself; the analytical structure preceded the picture, and the correlation between each symptom and its symptomological value was fixed once and for all in an essential a priori; beneath its apparently analytical function, the picture’s only role is to divide up the visible within an already given conceptual configuration. . . It makes nothing known; at most, it makes possible recognition.”).

198. The photographs of Diane Arbus and the circus freak show are extreme examples of the detached fascination of the able-bodied with human impairment. For a discussion of photographic interrogations of human impairment, see David Hevey, *The Enfreakment of Photography*, in *THE DISABILITY STUDIES READER*, *supra* note 32, at 332.

199. Kriegel, *supra* note 1, at 421.

200. Disability studies scholars frequently describe the tendency of the able-bodied to discount and silence the perspective of people with disabilities. See, e.g., Fries, *supra* note 31, at 1 (“Throughout history, those who live with disabilities have been defined by the gaze and needs of the nondisabled world. . . . We who live with disabilities have been silenced by those who do not want to hear what we have to say.”).

201. The failure of antidiscrimination law to afford adequate weight to the perspective of people with disabilities, and its tendency to generalize about their lives on the basis of the impairment, is not unique. For an interesting analysis of similar failings within tort law, see Ellen Pryor Smith, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the In-*

for example, refused to credit the plaintiff's sworn testimony that he could not walk without the aid of a cane or crutches, because it was corroborated only by the unsworn statements of two physicians.²⁰³ No matter how concrete and obvious an impairment's effects on a plaintiff's life, disability is not acknowledged unless a sufficient degree of "abnormality" exists in the opinion of able-bodied experts.²⁰⁴

Individualized disability determinations also reproduce the tendency of the able bodied to perceive people with disabilities as nothing more than their impairment.²⁰⁵ As one commentator has explained, "too often, we substitute the disabled part for the whole person. The images are so powerful they overwhelm all else."²⁰⁶ This phenomenon is starkly illustrated by the story of an airport encounter between Mary Lou Breslin, the executive director of a disability rights organization, and an able-

insurance Theory of Compensation, 79 VA. L. REV. 91 (1992) (explaining that theories of tort compensation rest upon nondisabled persons' fallacious views of disability). For a discussion of this tendency within sociology, see MICHAEL OLIVER, UNDERSTANDING DISABILITY 139-144 (1996) (describing scholarship critical of the exclusion of disabled perspective from sociological research).

202. Antidiscrimination law is ambivalent about the appropriate role of medical professionals in determining disability. On the one hand, it validates the authority of medicine by placing a high value on medical evidence of impairment and disability and by embracing an essentialist biomedical perspective on the nature of disability itself. See *supra* notes 23-35, 52-53, 65-103 and accompanying text. On the other hand, antidiscrimination law vests judges, not physicians, with the ultimate authority to determine disability.

203. See *Douglas v. Victor Capital Group*, 21 F. Supp. 2d 379, 384 (S.D.N.Y. 1998); see also *Leisen v. City of Shelbyville*, 968 F. Supp. 409, 416 (S.D. Ind. 1997) (crediting plaintiff's testimony regarding symptoms of psychological problem because corroborated by social worker).

204. See *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994) (summarily dismissing ADA claim because plaintiff did not provide medical evidence that asthma worsened by poorly ventilated areas); *Johnson v. St. Clare's Hosp.*, No. 96CIV.1425, 1998 WL 236235 at *8 (S.D.N.Y., May 13, 1998) (summarily dismissing ADA claim because plaintiff provided no medical evidence of alcoholism); *McGraw v. Sears, Roebuck & Co.*, 21 F. Supp. 2d 1017, 1021 (D. Minn. 1998) (summarily dismissing complaint because no medical evidence supported plaintiff's claim that her conditions substantially limited her ability to perform a major life activity); *Smith v. DataCard Corp.*, 9 F. Supp. 2d 1067, 1076 (D. Minn. 1998) (summarily dismissing ADA claim because no medical evidence existed of plaintiff's carpal tunnel syndrome); *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977, 981-82 (N.D. Ill. 1997) (summarily dismissing ADA claim because no medical evidence existed to show that plaintiff's cancer substantially limited his daily life); *Farley v. Gibson Container, Inc.*, 891 F. Supp. 322, 326 (N.D. Miss. 1995) (summarily dismissing ADA claim because no medical evidence supported plaintiff's testimony that he could not lift heavy objects after undergoing hernia surgery); *Dotson v. Electro-Wire Prods., Inc.*, 890 F. Supp. 982, 990, n.2 (D. Kan. 1995) (holding that doctor's statement that plaintiff cannot do hard physical labor was insufficient to corroborate her testimony of the existence of an impairment that substantially limited her ability to work); *Aucutt v. Six Flags Over Mid-America, Inc.*, 869 F. Supp. 736, 744 (E.D. Mo. 1994) (dismissing claim because plaintiff's claims unsupported by medical evidence).

205. Harlan Hahn attributes this tendency to the centrality of independence and autonomy to the American identity. See Hahn, *supra* note 41, at 43 ("In a society that appears to prize liberty more than equality, and that tends to equate freedom with personal autonomy rather than with the opportunity to exercise meaningful choice, the apprehensions aroused by functional restrictions resulting from a disability often seem overwhelming.").

206. Gartner & Joe, *supra* note 29, at 2.

bodied fellow traveler. As Breslin sat in her wheelchair drinking coffee and awaiting her flight, the stranger came up and dropped a quarter into her cup splashing coffee onto Breslin's business suit.²⁰⁷

Indeed, plaintiffs who wish to persuade a judge that they are disabled have no choice but to portray their impairment—in all its corporeal detail—as the central and defining feature of their identity and daily lives.²⁰⁸ Plaintiffs who make the mistake of revealing a self-perception that is not so defined, or who characterize their impairment as anything less than crippling, are summarily dismissed, along with their story of unequal treatment at the hands of the defendant.²⁰⁹

The demand of antidiscrimination law that plaintiffs portray their impairment as all-defining reflects and reinforces the imagined misery of the disabled life.²¹⁰ At the same time, this requirement conflicts with the lesson that people with disabilities have been taught throughout their lives: to avoid focusing on their disability, to overcome their limitations, and to develop an identity that is distinct from their impairment.²¹¹ In a culture

207. See SHAPIRO, *supra* note 3, at 19.

208. For a discussion of how the disability determination process for social security benefits similarly demands a one-dimensional identity from claimants, see Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 811 (1992) (describing how the eligibility requirements for widows' disability benefits inhibit counter-narratives that reveal autonomy or community).

209. See, e.g., *Sackett v. WPNT, Inc.*, 4 Am. Disabilities Cas. (BNA) 1597, 1600 (W.D. Pa. 1995), *aff'd*, 91 F.3d 125 (3d Cir. 1996) (stating that a plaintiff's failure to apply for Social Security benefits and to indicate on his job applications that he was disabled contradicts his claim of disability under the ADA); *Reeder v. Frank*, 813 F. Supp. 773, 781 (D. Utah 1992) (regarding a plaintiff with a speech disorder as not disabled in part because he had not declared himself "disabled" on his employment application form).

210. See Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, in THE DISABILITY STUDIES READER, *supra* note 32, at 172, 183-184 (discussing the predominant assumption among the able-bodied that the functional impairment is the central concern of the disabled). The "imagined misery" of the disabled life may also underlie judicial skepticism about claims of disability under antidiscrimination law if the plaintiff retains the ability to engage in recreational activities, which are presumed to be the exclusive domain of the healthy and able-bodied. See, e.g., *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994) (commenting that the plaintiff's participation in recreation activities cast doubts on whether her asthma substantially limited her ability to breathe); *South v. NMC Homecare, Inc.*, 943 F. Supp. 1336, 1341 (D. Kan. 1996) (contending that the plaintiff's use of treadmill at the gym undermines his claims that asthma is a disability); *Fuqua v. Unisys Corp.*, 716 F. Supp. 1201, 1206 (D. Minn. 1989) (arguing that evidence that the plaintiff participates in recreational activities may undermine the finding of a disability).

211. See, e.g., SHAPIRO, *supra* note 3, at 7 (arguing that many people with disabilities do not see themselves as part of a minority group because of a desire to "avoid the taint accompanying that label"); ZOLA, *supra* note 161, at 206 ("The very process of successful adaptation not only involves divesting ourselves of any identification with being handicapped, but also denying the uncomfortable features of that life."); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, n.53 (1993) ("The true overcomer is expected to minimize the evidence of her disability, not the impact the disability has on her life. It is most important to look able-bodied. Integrating a disability into one's life by making one's home accessible is treated as less worthy of admiration than learning to walk up the stairs of an inaccessible home.").

pervaded by the rhetoric of overcoming—by stories of individuals with disabilities who realize goals that are exceptional for the able-bodied—people with disabilities are encouraged to develop a self-perception that is totally at odds with the one demanded by antidiscrimination law.²¹² Harlan Hahn explains,

Persons with disabilities often are understandably reluctant to focus on that aspect of their identity that is most negatively stigmatized by the rest of society . . . Obviously, people may experience difficulty in developing a sense of identity with an attribute of themselves that they have been taught to “overcome.”²¹³

Given this dissonance between the demands of the culture and the demands of antidiscrimination law, it is hardly surprising that plaintiffs claiming discrimination may be ambivalent about describing themselves as disabled.²¹⁴

The contradictions embodied in disability discrimination law give rise to a final irony. In claiming discrimination, plaintiffs are asserting their fundamental equality with the able-bodied and their right to be treated with an equal measure of dignity. Yet at this very same moment, antidiscrimination law demands of them a performance designed to highlight their difference—their “abnormality.” Indeed, the requirement that plaintiffs dramatize their impairment in order to gain the recognition of antidiscrimination law returns individuals with disabilities to their traditional role within the biomedical model of establishing entitlement to benefits through the evocation of sympathy and pity.²¹⁵ This in itself reinforces the superiority of the able-bodied and the separateness and dependence of the disabled.²¹⁶

212. The depoliticizing effects of the rhetoric of the disabled hero—the overcomer—is a frequent subject of disability studies scholarship. *See, e.g.,* LINTON, *supra* note 23, at 18 (“The ideas embedded in the overcoming rhetoric are of personal triumph over a personal condition. The idea that someone can overcome a disability has not been generated within the community; it is a wish fulfillment generated from the outside.” (emphasis omitted)); ZOLA, *supra* note 161, at 204-05 (arguing that stories of overcomers send the message that if people like Franklin Delano Roosevelt can overcome their handicaps so can all the disabled, and the failure to do so represents a personal failing); Wendell, *supra* note 32, at 271 (“The image of the disabled hero may reduce the ‘otherness’ of a few disabled people, but because it creates an ideal which most disabled people cannot meet, it increases the ‘otherness’ of the majority of disabled people.”).

213. Hahn, *supra* note 47, at 310.

214. *See, e.g.,* Olbrot v. Denny’s, Inc., No. 97 C 1578, 1998 WL 525174, at *1 (N.D. Ill. Aug. 19, 1998) (noting that in response to a question about whether she considered herself disabled, plaintiff with cancer had stated, “I’m not disabled where I cannot work, no. . . . I did my job good.”); Sacket v. WPNT, Inc., 4 Am. Disabilities Cas. (BNA) 1597, 1600 (W.D. Pa. 1995), *aff’d*, 91 F.3d 125 (3d Cir. 1996) (noting that a plaintiff with crossed eyes had not described himself as disabled on job applications); Reeder v. Frank, 813 F. Supp. 773, 781 (D. Utah 1992) (noting that a plaintiff with a speech impediment had not declared himself disabled on his job application).

215. *See supra* notes 27-35 and accompanying text.

216. *See* BICKENBACH, *supra* note 18, at 196 (“Whatever the form . . . charity creates a relationship between giver and receiver that is inherently unequal and demeaning.”).

B. The Depoliticizing Effect of the Category of Disability in Antidiscrimination Law

Until the 1970s, most individuals with disabilities did not consider themselves to be members of an oppressed minority group. Instead, they tended to understand themselves and their marginalized status in accordance with the biomedical model, which located the source of their social and economic problems in the impairment.²¹⁷ Consistent with this view, the political and economic interests of the disabled were advanced by separate impairment-based associations, such as those representing the blind or children with muscular dystrophy.²¹⁸ These organizations often competed for government largesse, each attempting to prove that the constituency it represented suffered from the most severe impairment and was therefore the most deserving of public aid.²¹⁹

Since then, there has been a significant transformation in how people with disabilities perceive themselves and their social and economic circumstances.²²⁰ Specifically, many have come to recognize that all people with disabilities share similar experiences of social exclusion and stigmatization regardless of impairment.²²¹ Having rejected the culture's fixation on the particularities of impairment and concentrated instead on their shared history, people with disabilities now increasingly view themselves as members of a single minority group.²²²

The emergence of this collective identity precipitated a rejection of the impairment-based approach to political advocacy. In its place, advocates for people with disabilities adopted a rights-based minority group model based on the premise that all individuals with disabilities, regardless of impairment, are entitled to dignity, equal treatment, and full social

217. See *supra* notes 23-35 and accompanying text.

218. For a discussion of the history of advocacy for the disabled, see SHAPIRO, *supra* note 3, at 41-75; Scotch & Berkowitz, *supra* note 36, at 9-14 (describing political strategies employed by advocates for the blind).

219. See Funk, *supra* note 28, at 12 (describing tendency of impairment-based advocacy groups to perpetuate charity approach to disability).

220. See Hahn, *supra* note 28, at 185 (attributing emergence of "minority group model" to increased studies of effects of disability and growing political movement of disabled persons).

221. For a discussion of this shifting self-perception among people with disabilities, see SHAPIRO, *supra* note 3, at 11 (describing emergence of group consciousness among people with disabilities).

222. See SHAPIRO, *supra* note 3, at 24 (discussing 1985 poll finding that 74% of disabled respondents say they share a "common identity" with other disabled people and 45% say they are a minority group.); Funk, *supra* note 28, at 14 (describing growing recognition among people with disabilities during 60's and 70's that they "had rights, could choose, belong, and participate as full and equal members of society"); Hahn, *supra* note 47, at 299 (1985) (discussing increased willingness of disabled to form a cohesive political force to challenge their shared status in society); National Organization on Disability, *supra* note 182, at 7 (finding that 52% of adults with disabilities surveyed in 1998 and 40% of adults with disabilities surveyed in 1986 have a "strong sense of common identity" with other people with disabilities).

inclusion.²²³ Refusing to see themselves as deserving of public charity in direct proportion to the severity of their conditions, people with disabilities transformed themselves into a unified political movement that demanded and won legal reforms during an era of civil rights retrenchment.²²⁴

However, contradictions within antidiscrimination law counteract these developments. For example, the practice of determining disability on an individualized basis undermines a sustained political consciousness among people with disabilities and, in turn, undermines a unified disability rights movement.²²⁵ Unlike all other antidiscrimination laws, those protecting the disabled do not treat plaintiffs as members of a class that is automatically protected because society has made a commitment to eradicating the lingering effects of historical victimization.²²⁶ Nor does disability discrimination law adopt the far less radical approach of recognizing plaintiffs with specific types of impairments, such as AIDS, cancer, or deafness, as members of a *per se* protected class.²²⁷ Instead, the law constructs disability discrimination as an ahistorical, impairment-dependent phenomenon that can only be determined on a case-by-case basis.²²⁸

This discourse of individual impairment in antidiscrimination law en-

223. See SHAPIRO, *supra* note 3, at 14 ("People with disabilities are demanding rights, not medical cures."); Funk, *supra* note 28, at 17-23 (describing development of coalitions and organizations created by and designed to educate and advocate on behalf of disabled adults and children). For a global perspective on the disability rights movement, see CHARLTON, *supra* note 195, at 130-149.

224. See SHAPIRO, *supra* note 3, at 126 (describing unifying effect of struggle to enact ADA on groups that advocated for rights of the disabled).

225. For a discussion of the centrality of a categorical discourse to achieving gender equality, see Angela Harris, *Categorical Discourse and Dominance Theory*, 5 BERKELEY WOMEN'S L.J. 181, 183 (1989) (stating that the role of categorical discourse in attaining gender equality is "... to get women to stop thinking of themselves as individuals who happen to be female and to start thinking of themselves as individual members of the class 'women'") (reviewing CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989)). For a discussion of this issue with respect to racial equality, see Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 23-24 (1994) (arguing that rhetoric of the individual denies structural and institutional components of race and racism).

226. See Burgdorf, *supra* note 49, at 442 ("In contrast, other types of civil rights laws do not require establishing membership in a protected class. These statutes focus on the discriminatory acts that occur, not the qualities of the person discriminated against."); Locke, *supra* note 9, at 114 ("While under other antidiscrimination statutes the criterion that the plaintiff must be a member of the protected class is generally taken for granted, a plaintiff suing under the ADA must prove her membership.").

227. See *Homeyer v. Stanley Tulchin Assocs.*, 91 F.3d 959, 962 (7th Cir. 1996) ("A disability determination . . . should not be based on abstract lists or categories of impairments, as there are varying degrees of impairments . . ."); *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986) (stating that application of definition of disabled under FRA cannot be accomplished through abstract lists and categories of impairments; inquiry must be individualized).

228. See *supra* Subsection II.B.

courages people with disabilities to once again locate the origins of their marginalized social status and material inequality in their own impairment rather than in the organization of society. Antidiscrimination law further militates against political consciousness by conveying the message that it is impossible for plaintiffs with impairments that are anything less than crippling to be subjected to discrimination—no matter how unmistakable and blatant their unequal treatment.²²⁹ By denying the existence of discrimination, except in cases of severe functional impairment, antidiscrimination law masks both discrete instances of discrimination—even when directly experienced by the individual—and the pervasiveness of disability bias within society as a whole.

Antidiscrimination law also counteracts a unified disability rights movement by emphasizing impairment-based divisions among the disabled. By refusing to acknowledge as disabled all but a small number of individuals, the restrictive category of disability severely reduces the number of impaired and ill people who can, without contradiction, identify themselves as members of this minority group. Indeed, during its 1998-99 term, the Supreme Court seemed to officially cap membership in this minority group at 43 million.²³⁰

The dichotomizing rhetoric of the deserving and the undeserving disabled also pits people with disabilities against each other for entitlement to guarantees of nondiscrimination and reasonable accommodation.²³¹ Thus, while recognition as a protected class under civil rights laws generally reinforces a group's collective identity, antidiscrimination law encourages people with disabilities once again to view each other as contestants for the benevolence of the able bodied majority.²³²

229. See *supra* notes 65-176 and accompanying text.

230. In *Sutton v. United Air Lines*, 119 S. Ct. 2139 (1999), the Court concluded that the ADA was not intended to cover individuals whose impairments are successfully treated, because such an interpretation would expand the protected class beyond the numerical estimate of disabled Americans stated in the findings section of the statute. See *id.* at 2147-49 (referring to 42 U.S.C. §12101(a)(1), which states that, "some 43 million Americans have one or more physical or mental disabilities, and this number is increasing as the population as whole is growing older."). As Justice Stevens points out in his dissent, this is a rather odd analysis, considering that the Court had no difficulty construing Title VII of the Civil Rights Act of 1964 to protect Caucasians, a group that was clearly beyond Congress' concern in enacting this statute. See *id.* at 2157 (Stevens, J., Breyer, J., dissenting).

231. During Congressional hearings on the ADA, Representative Dannemeyer explicitly sought, without success, to encourage a witness—a Korean war veteran with paraplegia, to see himself as more deserving of the statute's protection than individuals with other impairments, such as alcoholism, drug abuse, and HIV infection. See LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT, at 1877-80 (1991).

232. One critic of the ADA predicted that the statute would strengthen the group identity and political strength of the disabled, which, in his view, was negative. See Oi, *supra* note 167, at 45 ("A poorly defined and fragmented target population of disabled individuals who are told that they are entitled to jobs, access, and disability benefits could emerge as a cohesive, articulate, and vocal minority who will become increasingly dependent upon the federal government

C. The Legitimizing Effect of the Category of Disability in Antidiscrimination Law

The category of disability perpetuates inequality by legitimizing many manifestations of disability bias while creating the appearance of a society that is fair in its treatment of the disabled.²³³ Most significantly, anti-discrimination law is completely indifferent to even the most flagrant acts of disability bias unless visited upon an individual who is severely impaired.²³⁴ Indeed, the category of disability ensures that many decisions and institutional criteria that discriminate on the basis of impairment or illness escape judicial scrutiny entirely.²³⁵ One recent study found that, in about one out of five decisions under Title I of the ADA, courts completely avoided consideration of the legality of the defendant's conduct by summarily dismissing the case on the ground that the plaintiff was not disabled.²³⁶ Antidiscrimination law also legitimizes inequality on the basis of disability by upholding the authority of employers to enforce standards of appearance in the workplace that marginalize people with disabilities. Under the ADA, an employer's prerogative to discriminate against employees whose visible impairment prevents them from conforming to prevailing norms is limited only if the impairment is immutable, and then only if it substantially limits a major life activity.²³⁷ Individuals with impairments that severely mar their appearance but do not produce severe functional limitations, and individuals with impairments that *only* affect their appearance, are denied the protection of antidiscrimination law.²³⁸

for their continued well-being.”).

233. See Freeman, *supra* note 14, at 1107 (“Placing the existing societal institutions and practices beyond the reach of the violation concept tends to legitimize those institutions and practices . . .”).

234. Antidiscrimination law's lack of concern for disability bias as long as it is expressed toward individuals whose impairments are not considered sufficiently severe is analogous to denying relief to a light-skinned African-American who is subjected to racism or to a nonobservant Jew who is subjected to anti-Semitism. As Professor Robert Burgdorf has rightly argued, by focusing on the authenticity of the victim rather than on the fairness of the perpetrator's act, the narrow definition of disability negates the social justice objective of civil rights law. See Burgdorf, *supra* note 9, at 568 (“Nondiscrimination is a guarantee of equality. It is not a special service reserved for the select few.”).

235. Indeed, as one commentator has noted, the more irrational and idiosyncratic an employer's belief about an impairment, the more likely it will escape judicial review under the “one job is not enough” rule. See Mayerson, *supra* note 9, at 599.

236. See American Bar Association, *supra* note 177, at 403. The results of this study refute the early prediction of one commentator that the ADA's individualized disability determination process would make it difficult for defendants to obtain summary judgment. See Thomas H. Barnard, *Disabling America: Costing Out the Americans with Disabilities Act*, 2 CORNELL J.L. & PUB. POL'Y 41, 48 (1992) (predicting that ADA's case-by-case structure and minimal showing necessary to survive motion for summary judgment would make it difficult for defendants to obtain this relief).

237. See *supra* notes 91-98, 113-132 and accompanying text.

238. See, e.g., *Van Sickle v. Automatic Data Processing, Inc.*, No. 97-1255, 1998 WL 863707, at *3 (6th Cir. Nov. 23, 1998) (holding that plaintiff with facial scar is not disabled under the

III/Legal

In the case of *Talanda v. KFC National Management Co.*,²³⁹ Paul Talanda, the manager of a fast food restaurant, hired Dorothy Bellson as a customer service worker. He did so despite the fact that many of her teeth were missing, because she had the necessary qualifications—prior experience and an outgoing, friendly personality.²⁴⁰ After a visit from a supervisor from corporate headquarters, however, Talanda was ordered to reassign Bellson because of her “unprofessional appearance.”²⁴¹ Talanda refused to carry out this directive, viewing it as morally wrong and a violation of antidiscrimination law. Eventually, he was discharged for insubordination.²⁴²

In assessing whether he had a stated claim of retaliatory discharge under the ADA, the Seventh Circuit Court of Appeals began by examining whether Talanda’s belief that he was opposing discrimination was “reasonable.”²⁴³ The court concluded that Talanda could not reasonably have believed that he was opposing unlawful discrimination, because Bellson’s impairment was not substantially limiting—and therefore disabling—within the meaning of the ADA.²⁴⁴

By empowering employers to discriminate against qualified workers like Ms. Bellson, who have visible impairments that do not substantially limit a major life activity—and against their workplace defenders like Mr. Talanda—disability discrimination law reinforces the larger role of the labor market in enforcing cultural standards of appearance that themselves contribute to the marginalized status of the disabled.²⁴⁵ Disability studies scholars argue that a significant source of disability bias is “aesthetic anxiety,” an aversion toward individuals whose physical appearance differs markedly from the cultural norm.²⁴⁶ As Harlan Hahn ex-

ADA); *Talanda v. KFC Management Co.*, 140 F.3d 1090, 1097 (7th Cir. 1998) (holding that person whose appearance is marred by missing front teeth is not disabled under ADA); *Lindloff v. Schenectady Int’l*, 972 F. Supp. 393, 395 (S.D. Tex. 1997) (holding that leukoderma, which caused loss of pigmentation on skin on various parts of plaintiff’s body, is not disability); *Gray v. Ameritech Corp.*, 937 F. Supp. 762, 769 (N.D. Ill. 1996) (holding that plaintiff with psoriasis that produced white, flaking sores on her face and body is not disabled under ADA).

239. 140 F.3d 1090 (7th Cir. 1998).

240. *See id.* at 1092.

241. The supervisor stated that, because of her missing teeth, the counter worker did not project a “professional image.” *Id.* at 1092, n.2.

242. *See id.* at 1094.

243. *Id.* at 1096-97.

244. *See id.* at 1098.

245. *See, e.g., Van Sickle v. Automatic Data Processing*, No. 97-1255, 1998 WL 863707 (6th Cir. Nov. 23, 1998) (affirming the dismissal of an ADA claim by a plaintiff who alleged that the employer repeatedly referred to him as “scar face” in the presence of customers, and ultimately terminated his employment); *Christian v. St. Anthony Med. Ctr.*, 117 F.3d 1051, 1053 (7th Cir. 1997) (stating that it is not a violation of the ADA to fire an employee with an unsightly skin disease because the employer is revolted by her appearance).

246. This analysis is supported by an extensive body of social science literature finding that favorable treatment is regularly afforded to individuals who are considered physically attractive

plains, "discrimination directed at disabled individuals is partly due to their being devalued because they do not present conventional images of human physique or behavior."²⁴⁷ Since these visible differences are often understood to reflect biological inferiority, the subordination of the disabled appears natural.²⁴⁸ The indifference of disability discrimination law to workplace standards of appearance permits the labor market to perpetuate majoritarian norms that stigmatize visibly impaired individuals.²⁴⁹

Disability discrimination law is arguably less just in its treatment of individuals discriminated against because of appearance than civil rights laws protecting other groups. For example, it is a violation of Title VII of the Civil Rights Act to establish appearance requirements that discriminate on the basis of a characteristic that is immutably linked to race, gender, or national origin.²⁵⁰ This body of law recognizes the injustice of denying employment to a qualified applicant solely because of an innate characteristic that he or she is powerless to alter.²⁵¹ In contrast, when an

in cultural terms. *See generally* ELAINE HATFIELD & SUSAN SPRECHER, *MIRROR, MIRROR: THE IMPORTANCE OF LOOKS IN EVERYDAY LIFE* (1986); GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENON* (1985); Ellen Berscheid & Elaine Walster, *Physical Attractiveness*, 14 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 157-214 (1974). Some commentators completely ignore this source of bias toward people with disabilities to rationalize the exclusion of all but the severely impaired from the protections of the ADA. *See, e.g.*, Harris, *supra* note 163, at 595 (asserting, without any empirical support, that disability bias originates from the "fact that [individuals with disabilities] are substantially limited in some fundamental aspect of living compared with the average person").

247. Hahn, *supra* note 41, at 44. Until recently, this "aesthetic anxiety" found expression in statutes that prohibited individuals with an "ugly" or "unsightly" appearance from appearing in public. *See Note, Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 *HARV. L. REV.* 2035, 2035 n.2 (1987). Currently, some antidiscrimination statutes include appearance as a prohibited basis for discrimination. *See, e.g.*, D.C. CODE ANN. § 1-2512(a) (1981).

248. Hahn, *supra* note 28, at 192 (discussing the widespread assumption that disabilities are a reflection of biological inferiority that makes the subordination of the disabled appear natural).

249. *See* HYDE, *supra* note 14, at 78 (describing the labor market as the most powerful social mechanism for disciplining and dominating the body); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 *NEW ENG. L. REV.* 1395, 1398 (1992) ("The primary social function of appearance law is to empower employers, school officials, judges, and other authority figures to enforce the dominant expectations about appearance and to discipline deviance from the approved social norms.").

250. *See Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (stating that equal employment opportunity may be secured only if employers do not discriminate against employees on basis of immutable characteristics).

251. *See id.* at 1091 ("[I]f the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job."). Of course, this rationale for denying the protection of antidiscrimination to individuals with mutable differences in their appearance itself legitimizes irrational and biased conduct and reaffirms the hegemonic role of the labor market by empowering employers to require that employees who *can* control their appearance do so to conform with majoritarian norms. For an extensive discussion and critique of appearance law, see Klare, *supra* note 249, at 1318. Mari Matsuda has argued that antidiscrimination law ought to prohibit discrimination on the basis of both mutable and immutable characteristics. *See Matsuda, supra* note 171, at 1400 ("A true antisubordination agenda would apply reasonable accommodation to all differences, whether chosen or immutable, that are historically subject to exploitation

employer discriminates against a qualified employee because of a condition that, while in no way affecting his or her ability to do the job, results in an unacceptable physical appearance, disability discrimination law has not been violated—unless the employee is substantially functionally impaired.²⁵² For many visibly impaired employees who experience discrimination due to their appearance, disability discrimination law thus affords only one course of action: to find employment elsewhere.

At the same time that it deems many manifestations of disability bias to be nonviolations, antidiscrimination law encourages the perception that society is already fair, responsive, and rational in its treatment of people with disabilities. By affording protections to so few, it suggests that discrimination on the basis of disability is a minor, relatively rare phenomenon—the exception rather than the norm. This construction legitimizes the legal system by making it appear capable of eliminating the seemingly limited problem of disability bias through individualized adjudication.

Moreover, by protecting and affording accommodations to those people with disabilities who deviate most dramatically and visibly from majoritarian norms, the law contributes to the appearance of a society and labor market that are singularly concerned with merit and highly responsive to the needs of the disabled. Eventually, the ADA's success in eliminating the most overt manifestations of disability bias may serve to undermine majoritarian support for the cause of disability rights by encouraging the belief that society has done everything it can to address the problems faced by people with disabilities.²⁵³

V. CONCLUSION

Formal legal rights protecting the disabled have undoubtedly heightened public awareness and improved the lives of some individuals with disabilities. However, these gains have not come without costs to the ultimate goal of ending inequality based on disability. The judiciary's insistence upon viewing disability as an essential, biomedical fact—and its resistance to adopting a social political perspective—has led to the construction of a highly restrictive category of disability that reserves the law's protection for the relatively few who fit the American disabled

or oppression by dominant groups.”). For an interesting judicial discussion of the injustice of permitting discrimination on the basis of a mutable physical characteristic, see the dissenting opinions of Justices Douglas and Marshall in *Ham v. South Carolina*, 409 U.S. 524 (1973).

252. See *supra* note 239 and accompanying text.

253. Kimberle Williams Crenshaw has persuasively argued that the elimination of overt manifestations of race discrimination and the rhetoric of formal racial equality have convinced many in the majority that the problem of racism is a thing of the past thereby undermining their support for civil rights movement. See Crenshaw, *supra* note 16, at 1347-48.

ideal—men and women who struggle for independence and self-support despite the most incapacitating of impairments. In addition to upholding the deeply held values of individualism and self-reliance, this category enforces an oppressive set of expectations on the vast ranks of the “merely ill” who are excluded from its bounds: they must rise above their impairment or illness, meet the demands of the workplace and the physical environment, and bear the consequences of an inability to do so—and of any resulting discriminatory treatment—on their own.

Instead of informing and advancing a public dialogue about the myriad ways in which people with mental and physical differences are treated unfairly, the narrow category of disability fosters a distorted understanding of the origins and prevalence of disability bias even as it legitimizes many of the ways in which that bias is expressed.

While assessing the effect of an impairment upon whether an individual can perform certain life activities may be appropriate in certain contexts, it sheds no light whatsoever on whether a person possesses—or has been perceived to possess—a physical or mental difference that may have caused him or her to be subjected to social stigma and injustice.²⁵⁴ The major life activity criterion, and particularly its narrow interpretation by the courts, rests upon the rationalist assumption that individuals with impairments that do not impose severe functional limitations will not elicit bias, because bias necessarily arises from misjudging a person’s capacities. However, this assumption is contradicted by studies of disability bias and the recent history of early public reactions to people with HIV infection. Both of these demonstrate that discrimination on the basis of physical or mental difference often originates in complex unconscious mythologies that have nothing to do with misunderstanding an impairment’s functional effects.²⁵⁵

According to disability studies scholars, a far more common motive for stigmatization and exclusion based on mental or physical difference is a desire among the healthy and able bodied to avoid confronting the fundamental—and fundamentally unalterable—vulnerability of the human body. One commentator explains, “the disabled body is always the re-

254. From a practical standpoint, the capacity of antidiscrimination law to identify and remedy instances of disability bias would be significantly enhanced by a definition of disability that required only that the plaintiff have an actual or perceived mental or physical impairment.

255. See *School Bd. v. Arline*, 480 U.S. 273, 284 n.12 (1987) (stating that, “[t]he isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness.”); Hahn, *supra* note 18, at 49-50 (discussing sociological research on disability bias); Hahn, *supra* note 47, at 304-09 (suggesting that main sources of disability bias are “aesthetic anxiety,” which is the aversion to persons with a “deviant” physical appearance, and “existential anxiety,” which is the sense of one’s own physical vulnerability that is triggered by an encounter with a person who is disabled).

III/Legal

minder of the body about to come apart at the seams. It provides a vision of, a caution about, the body as a construct held together willfully, always threatening to become its individual parts—cells, organs, limbs, perceptions”²⁵⁶ Ending inequality based on disability, therefore, will depend on society’s embrace of a far more inclusive concept of justice and a much broader emancipatory vision than the one embodied in antidiscrimination law.

256. Lennerd J. Davis, *Nude Venuses, Medusa’s Body, and Phantom Limbs: Disability and Visuality*, in *THE BODY AND PHYSICAL DIFFERENCE*, *supra* note 32, at 51, 55.

